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THE CHARACTERISTICS OF ENGLISH CRIMINAL LAW.

When Sir Matthew Hale made the Crown Law his principal study, he was led to do so, we are told, by "a compassionate concern for the lives and liberties of mankind on the one hand, and for preserving the public peace on the other;" and it would seem to most persons almost pedantic to notice formally the fact, that the subject of Criminal Law is one of much importance. Amongst lawyers, however, it is unquestionably true that neither its study nor its practice is in high repute. The discussion, whether men are to be forcibly deprived of their liberty, their property, and, in some cases, of their lives, cannot indeed, by the most frivolous or cynical, be considered as otherwise than serious; but the low professional estimate of this branch of legal business is perfectly natural, and indeed almost unavoidable. The great bulk of the criminal business of the country is of the most petty kind, and is transacted before courts which the most ardent imagination cannot invest with impressiveness. The questions at issue are generally the very narrowest and simplest; the counsel engaged in them are either beginners, to whom it is an object to acquire familiarity with the routine of procedure and the practical application of the common rules of evidence, or they are men who will never rise above the lower ranks of their profession, and who supply by a certain keenness acquired by practice, and the exercise of a natural gift of fluency and plausibility, the absence of any very deep knowledge of law, or of any very extended education. Of course, there are frequent exceptions; but such is not unusually the

character of those who exercise this branch of the profession of the law. The ordinary routine of business at a Court of Quarter Sessions would be something as follows: — A. B. is accused of stealing a pair of boots — the prosecutor swears they were safe on Monday morning, and a pawnbroker that the prisoner pledged them on Monday afternoon. The prisoner says he found the boots. C. D. is accused of obtaining books worth ten shillings from a shop-keeper, by falsely pretending that somebody else had sent him for them. The shop-keeper proves the pretence and the delivery of the books, and another witness negatives the sending. The prisoner says, "You're a false man," or "You're not the witness of truth." E. F. is indicted for an attempt to rob G. G. swears that he was walking home, when he met two men, who began abusing him; one of them challenged him to fight, and the other, being the prisoner, tripped him up, and kicked him when he was down. He heard some one say, with an oath, "Knock his brains out." Both were on him at once. Such a case is probably defended, and the defence is so uniform, that nothing would be easier than to write out the whole proceedings at length. The great point of it always is, that the prosecutor had been at a great many different public-houses on the night in question, and was so drunk that he did not know what happened. He generally has to admit that he was not quite sober; and there are a set of smart sayings about the difficulty of understanding the state of a man who was neither drunk nor sober, which, like the Common Law itself, may almost claim the veneration due to a universal and immemorial tradition.

It is not surprising that many persons should shrink from passing years in witnessing and taking part in such scenes; and it must be added, that the fees paid both to counsel and attorneys for transacting criminal business are extremely small. Indeed, though there can hardly be a more difficult or delicate task than that of conducting a complicated prosecution, the great majority of cases are so plain and short that they may safely be intrusted to the most ignorant or incompetent; briefs in them are, in fact, given away either by rotation or by favor. The consequence is, that, except in political trials, or in cases of a very grave character, such as the more aggravated class of murders, or in those which are of a semi-civil nature, as criminal informations for libel or assault, fraudulent bankruptcies, extensive embezzlements, or

great mercantile frauds, it is very uncommon for men eminent either as barristers or as attorneys to enter a criminal court.

When, however, we have divested our minds of these impressions, the real gravity of the subject becomes so apparent, that if it is not recognized at once, it can never be perceived. The moral significance of deliberately branding a fellow-creature with an indelible stigma, of blasting his prospects for life, of exposing him to something like the certainty of utter moral ruin, and, in certain cases, of deliberately, wilfully, and publicly killing him, is such that it would be simply impertinent to illustrate or to enlarge upon it. It is proposed, in the present paper, to give an account of some of the principal features of the system by which this awful national duty is discharged. It requires but a very slight acquaintance with any part of the law of England to disabuse a man of the illusion that what he may write upon such a subject can have any technical value; but though it would be impossible, within moderate limits, to enter into details sufficiently minute to interest or to instruct legal practitioners, it is not impossible to draw an outline of the general structure, character, and procedure of the Criminal Law, which, if free from gross error, will be neither uninstructive to general readers, nor altogether uninteresting to members of the profession.

The law of England is composed of three principal branches of very unequal authority. These are Statutes, Reports and Text Books. The Statutes begin from Magna Charta (9 H. III.), and extend to the present year. The Reports are records of the decisions of the courts upon particular states of facts, involving sometimes a more or less distinct enunciation of the principles upon which they proceed. Including the early series, called the Year-Books, they cover a period extending from the reign of Edward II. downwards. The Text-Books, of which Bracton is, perhaps, the oldest now in credit, were written by a variety of private authors, from the reign of Henry III., and are of all shades of value, — the opinions of Littleton, Coke, Sheppard, and some other writers, being of almost as high authority as the express enactments of Parliament; whilst others — especially the later ones—neither have, nor claim, any independent weight, and aim merely at the merit of being indexes, more or less accurate and convenient, to works of authority.

These depositories contain two different kinds of law, known respectively as Common and Statute Law. The

Statute Law consists of Acts of Parliament, and the Common Law comprises a number of old traditions, long since reduced to writing by a variety of text-writers, and a series of judicial expositions and comments on every branch of the law, contained in a great number of reported decisions upon particular states of fact. It may be observed once for all — what must be obvious enough to any one who impartially considers the subject — that the power which the judges possess of pronouncing, with authority, which of several views upon a particular subject is the true one, and what are the principles to be followed upon questions arising for the first time, is a qualified power of legislation. The Criminal Law may, therefore, be said to consist of two branches, of which each is subject to increase by a species of legislation proper to it; the Statute Law, by the unqualified legislative powers of parliament; the Common Law, by the qualified legislative power intrusted to the judges. We will endeavor to draw a very broad outline of the relation of these branches to each other, and of the separate provinces with which each of them is concerned.

The earliest notions on the subject of crime are so very obvious as to be almost universally adopted. Probably every country in which there is anything approaching to civilization agrees in punishing the intentional destruction of life, the infliction of wounds, the appropriation by one man of the goods of another, certain outrages against women, burning houses, and some forms at least of what in ancient times was called *crimen falsi* — such, for example, as perjury, cheating, and the simpler kinds of forgery. In early times it was supposed to be an easy thing to give sufficiently plain descriptions of these offences for the purposes of justice; and, no doubt, where it is possible to decide every case on its own merits, without creating a precedent by the decision, there would not be the same difficulty in the undertaking as there is at present. Such general descriptions are still to be found in Bracton and other ancient writers, who, for the most part, copied his statements. By degrees it was found that there were large classes of crimes which the course of society developed, and for which such definitions did not provide. Acts of Parliament were accordingly passed, from time to time, to punish them. This accounts for one large class of the penal statutes. A further discovery was, that the loose descriptions of crime, which passed for definitions, left great

gaps in the law, if they were strictly construed; and this gave rise to an immense crop of judicial decisons, explaining, adding to, and distinguishing from, the descriptions in question, in the hope of stretching the old phrases to meet new circumstances, without the assistance of the legislature. The ancient definitions, as explained by judicial decisions, were called "the common law," "the unwritten law," "the general custom of the realm," and so forth — partly because tradition once really had some connection with them, partly because the use of such phrases concealed the fact that the judges in reality made, though in form they only declared, the law. This system, though rude and imperfect in some particulars, and though arbitrary and technical to a very high degree in others, was very little interfered with by Parliament till very modern times indeed. The 25 Edward III., which gave an authoritative exposition of the Common Law, as to treason, is almost the only instance in early times of an interference by express enactment with the course of judicial decision. Indeed, the discretion of the judges was anciently so much more extensive than it is at present, that legal anomalies caused less practical inconvenience, and attracted less attention, than has since been the case. People, too, were more inclined to look upon law as a science, which had its own necessities and difficulties like mathematics, and were less alive to the fact that we can make what laws we please. Sir Michael Foster's Discourses on Crown Law, and especially his attempts to reduce the distinction between murder and manslaughter to reasonable principles, are excellent illustrations of the manner in which a very able mind, familiarly acquainted with the technicalities of its profession, struggled to put a reasonable construction upon obsolete, unmeaning, or absurd distinctions.

The result of the whole is, that till within the last thirty years the law consisted of descriptions of the commoner kind of crimes, partly very ancient and partly modern, but forming in the aggregate a coherent system — very incomplete, no doubt, and far from being reasonable where it was complete. The Statute Law upon the subject was a vast mass of enactments, affixing punishments — generally the punishment of death — to all sorts of acts, with no regard whatever to genus or species.

This state of things attracted considerable attention, principally in consequence of the writings of Jeremy Bentham;

and within the last thirty years many efforts have been made to consolidate and simplify the Statute, and to regulate the Common Law. They have, however, been marked by so curious a want of system, that the two branches of the law are mixed together in a manner of which nothing but illustrations can give the least conception. Goods were classified, for example, at Common Law, as being either *choses in possession* or *choses in action* — the latter class comprising such movables as the owner had a right to possess, though he had not the custody of them. Thus a watch is a *chose in possession* — money due, a *chose in action*. It was held to be essential to the crime of theft that a man should deprive another of the possession of his goods, and hence it followed that *choses in action* were not the subject of larceny.[1] This was obviously the rule of a rude age, in which there was very little personal property; but it was adhered to even after bills of exchange, bank-notes, and other *choses in action* (for a bank-note is only evidence of the holder's claim on the bank), had become common; and in order to avoid the inconvenience arising from the fact that such writings were not the subject of larceny, acts were passed (of which 7 & 8 G. IV., c. 29, s. 5, is now in force) by which it was made felony to steal "any talley order or other security whatever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this Kingdom of Great Britain, or of any foreign State, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank, or" to "steal any debenture, deed, bond, bill, or warrant, order, or other security whatsoever, for money, or for payment of money, whether of this kingdom or of any foreign State, or any warrant or order for the delivery or transfer of any goods or valuable things." The law, therefore, now stands thus: *Choses in action* are not the subjects of larceny by Common Law; but almost every sort of *chose in action* which has a material existence is the subject of larceny by statute. The law, as a general principle, forbids the use of any one of the ten ciphers; but, by express enactment, it allows every one to use 1, 2, 3, 4, 5, 6, 7, 8, 9, or 0, when he has occasion. It is really no exaggeration to say that the ingenuity of the legislature has been racked to reduce the Common and Statute Laws respectively to the position of the clauses of the famous

[1] 4 Steph. Com. 184. Another reason was, that they were of "no value."

Highgate oath — never to drink water when you can get wine, unless you like drinking water better. Unfortunately, though it is comparatively easy to use so general a phrase as "*chose in action*," it is very difficult to count up the whole of its component parts, so as to be able to deny of each of them individually what you have affirmed of all collectively; and inasmuch as the exception does not quite exhaust the rule, it still applies occasionally. It was a question, for example, whether a post-office order was within the statute;[1] and it has been held that an unstamped check not made payable to bearer is not.[2] This instance affords a good illustration of the existing relations between Common and Statute Law. The Common Law lays down a broad and bad principle — the Statute Law deprives it of force in every particular case that occurs to the draughtsman of the bill; but as it is no easy matter to give an exact equivalent of one general term in many terms less general, there always remains a certain debatable land between the rule and the exception intended to repeal it, which furnishes a large proportion of those anomalies and absurdities with which English law is so often reproached. It is a fanciful but not quite inappropriate comparison to say that the juncture between the Common and Statute Law is something like the moraine between a glacier and its bank. Each has its own structure and its own irregularities; but the juncture of the two opposes to progress the combined difficulties of rock, mud, ice and crevasses.

When we pass from the relation of the two great branches of the law to their specific peculiarities, we find ourselves upon clearer ground. What remains of the old Common Law is circumscribed within very narrow limits, and may be described as consisting almost entirely of principles and definitions. The principles of the Common Law relate mostly to certain broad preliminary questions which apply equally to all crimes, whatever may be their nature. A very good notion of their general objects may be obtained from the early chapters of the Code Pénal, or the Code of Louisiana. Taking the former of these as our guide in the distribution of the subject, we will briefly indicate their scope.

The preliminary dispositions of the French Code classify offences as *crimes délits*, and *contraventions*, according to the gravity of the punishments which they incur. The classifica-

[1] Regina v. Gilchrist, 2 Moody, 233.
[2] Rex v. Yates, 1 Moody, 170.

tion into treasons, felonies, and misdemeanors of the English law is a Common Law classification, but it is curiously anomalous and unmeaning. An attempt to murder was at Common Law only a misdemeanor, whilst to steal twelve pence was a capital felony. Statutory provisions have increased this confusion; for it is a felony to embezzle, and a misdemeanor to obtain goods by false pretences. Another of the preliminary dispositions of the Code Pénal regulates the guilt of attempts to commit crimes. In England, this matter depends partly upon the Common Law, the rules of which relating to it are very obscure, but the question itself is one of the greatest diffiulty. The first book of the Code Pénal enumerates and classifies punishments. In England, this subject is regulated almost entirely by statute; the fines and imprisonments inflicted for misdemeanors or contempts are almost the only Common Law punishments now in use. The second book of the Code Pénal relates to the responsibility of infants and lunatics, and to the law of principal and accessory. These subjects, in England, are regulated principally by the Common Law, and form nearly its most important title; but the most important branch of all is undoubtedly that which relates to procedure, including the rules of evidence.

It would be impossible to characterize in a few words principles of so wide an application. The entire want of any reasonable classification of crimes or punishments is a very great defect in the law, though it must be admitted that so many considerations are connected with the whole subject of legal punishment, that it is impossible to look upon it merely from a legal point of view. Crimes, however, might be advantageously and easily classified, and some not inconsiderable anomalies would be removed in the process. The law which regulates the responsibility of those who, in the broad legal sense of the words, are "*non compotes mentis*," rests upon a very sound principle indeed, with which it would be most disastrous to tamper. Perhaps the most curious instance upon record of the substantially legislative character of the force which is given to judicial decisions is to be found in the fact that the whole law upon this subject is regulated by the answers given by the judges, in 1843, to certain questions referred to them by the House of Lords, in the case of M'Naghten, the assassin of Mr. Drummond. The law of principal and accessory, on the other hand, is in some of its features exceedingly harsh. For example, if several persons

are engaged in a common design to pick a pocket, and in its execution one of them murders the person to be robbed, all are guilty of murder. The merits of the Common Law procedure and rules of evidence will be fully considered hereafter.

Besides the Common Law principles, there are still in use a considerable number of Common Law definitions of crimes. Indeed, that system still exercises very great influence upon the legal conceptions of all the commoner offences. We have already given an illustration of the sort of relation in which the old definitions stand to the new enactments; but the definitions themselves, which the statutes explain, have various special peculiarities which must be studied by any one who wishes to appreciate English Criminal Law. It has become fashionable to speak of the English mind as being a stranger to refined speculation; but, amongst the numerous contradictions of this view which experience supplies, none is more remarkable than that which is conveyed by the history of English law. It would be much more like the truth to say that in this department of knowledge the principal defect of the English mind is the habit of over refinement. The wonderful interpretations given to the apparently simple language of the Statute of Frauds, the whole of the system of special pleading which grew up under what were called the New Rules, and the strangely distorted feats of ingenuity which are still to be seen in Fearne's Contingent Remainders, are standing illustrations of this truth. None, however, are more curious than those which are to be found in the Common Law definitions of crimes. There is a distinction in kind between the view which is taken of crimes by the Common and by the Statute Law. The Common Law originally aimed at being a philosophical system; and, though the principles of logic, morality, and politics on which it reposed are now to a great degree exploded, its ancient character still clings to it so far that its definitions are, for the most part, generic and not specific. The Statute Law, on the other hand, hardly ever aims at generic definitions, but confines itself almost entirely to the creation of specific offences. For example, the Common Law gives a generic definition of theft. The Statute Law creates the particular offence of stealing in a dwelling-house above the value of five pounds, and affixes to it a specific punishment. The Com-

mon Law contains a general definition of forgery;[1] but the Statute Law has specified so many varieties of forgery, such as the forgery of exchequer-bills, deeds, dividend-warrants, &c., that the offence of forgery at Common Law has been nearly superseded. Indeed, it would require great ingenuity to commit it, without committing at the same time a statutory offence.[2] The principal crimes to which Common Law doctrines still apply are, as might have been expected, those which are common to all nations and to all states of society. Theft and homicide are the most important, and the definition of each of them supplies most characteristic illustrations of the genius of the system. If it were desirable to characterize them in a few words, it might be said that the specific peculiarity of Common Law definitions of crime is, that having been originally descriptions, they have been manipulated into definitions. The oldest definition of theft still in force is that of Bracton: *Furtum est secundum leges contractatio rei alienæ, cum animo furandi, invito illo domino, cujus res illa fuerit;*[3] and after various extensions and adaptations by Coke, Hale, and others, it was defined by East as "The wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to the taker's own use, and make them his own property without the consent of the owner."[4] It is obvious that the "*animus furandi*," in the first, and the word "felonious," in the second of these definitions, entirely destroy their value, because they introduce into the definition the term to be defined. It must, however, be remembered that Bracton wrote long before there were reports, and whilst the law was really in a great measure traditional; and indeed it is obvious from the whole tone of his book that he aimed at nothing more than a description of the system which he saw in action. His account of theft is instructive enough, if this is borne in mind. Its deficiencies,

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[1] 2 Russell on Crimes, 318. 3 Cush, 152. 3 Gray, 446.

[2] The problem was perhaps solved by a man who painted the name of an eminent artist on the back of a picture to increase its value. A case was reserved to determine whether the solution was sound. It was decided that he was not guilty of forgery.—Regina *v.* Closs, Dearsly & Bell, 460.

[3] Brac. fo. 150 b.

[4] 2 East P. C. In a recent case, PARKE B. observed that this definition needs some addition; the taking should be not only wrongful and fraudulent, but should also be "without any color of right."—Regina *v.* Holloway, 1 Denison, 375.

considered as a definition, were no doubt speedily discovered, when in the natural course of events it came to supersede the authority of oral tradition. Incidents were then grafted upon it, and technical meanings affixed to its different members, in order to adapt it to particular cases, and it thus grew by degrees into the cumbrous, and, to the ordinary reader, utterly unintelligible definition which has been quoted from the modern author. Who, for example, would understand that by a "taking," Sir John East understood a taking out of the owner's possession, which possession might be actual or constructive, and that, if the owner delivered the goods to the thief as his servant, he did not divest himself of the possession; whereas, if he delivered them to him not as servant but as baillee, he did; and that, therefore, if a servant sent out to exercise a horse, rode off with him, he would transfer him from his own possession *qua* servant (which was the master's possession) into his own possession *qua* thief, which would be larceny; but that if, on the other hand, a man gave a carrier a parcel of goods to carry, he parted with the possession of them — so that if the carrier appropriated them he would not be guilty of theft unless he cut open the parcel and stole part, in which case he would, — because, though the possession was transferred, it was only the possession of the parcel, as given, and not the possession of its contents, however arranged.[1] All this learning is contained in the word "take," and there is almost as much in the word "feloniously," and not a little in the words "carry away." Lord Burleigh certainly nodded his head to much less purpose.

The history of the famous words, "malice aforethought," in the definition of murder, is very similar. "Aforethought" is a word to which it is impossible to attach any meaning at all which is not absolutely universal. No act is ever consciously done which is not done of some motive "aforethought," for the intention must precede the act; and whether it precedes it by a second or by a year, it equally precedes it.[2] Malice, also, is a word of the vaguest kind, and its legal interpretation makes it almost unmeaning, for it may be either express or implied; and the judges seem from time to time to have determined to imply it whenever they found a

[1] Commonwealth *v.* Brown, 4 Mass. 580. First Report of Eng. Crim. Law Com. p. 20, &c. 2 Russell on Crimes, p. 29, &c.

[2] See Commonwealth *v.* Webster, 5 Cush. 306.

case of homicide in which they thought the criminal ought to be hung, and which did not fall within the natural meaning of the definition of murder. For example, "a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved."[1] So if A. kills B., meaning to kill C., the law considers that the malice "*transit in personam*." In short, having given a forged bond, the law keeps by it a quantity of forged receipts, to use as occasion requires. If we consider the phrase, "Murder is the killing a person under the King's peace with malice aforethought," as a description of the crime, it is a good one, for it would probably characterize fairly enough the distinctive features of a very large proportion of murders; but if we look upon it as a definition, it is a very bad one indeed, for there are many murders to which it does not apply. The Judges, considering themselves tied down to the words "malice aforethought," stretched them, by such fictions as we have attempted to describe, to the required extent.[2]

There is a strange peculiarity about the definitions of murder and manslaughter, which is almost unique in the history of English law. The "*murdrum*" which Bracton mentions was not our murder, but was merely secret killing, and was distinguished from other homicide, not by its gravity nor by its punishment (for manslaughter was, till modern times, a capital though clergyable felony), but by the fact that it gave rise to what was called a "presentment of Englishry,"—that is, unless the murdered man were proved to be an Englishman, and not a Norman, it was presumed that he was a Norman, and the township was fined. The only qualifications of homicide known to the ancient Common Law were homicide *se defendendo*, and homicide *per infortunium*; the modern distinction was established entirely by judicial distinctions and refinements, and its intricacies and defects may therefore be considered as a palmary example of the character of Common Law definitions of crime.

This short sketch will give some general notion of the character and scope of the Common Law in relation to crime. We will proceed to give a short account of the existing state

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[1] 1 Russell on Crimes, 483. See Commonwealth *v.* Webster, 5 Cush. 304, 305.

[2] 2 East P. C. 552–554.

of that part of the Statute Law which refers to the same subject. It is the special peculiarity of English Acts of Parliament to abstain from laying down general principles. They consist almost exclusively of particular provisions adapted to specific circumstances. This is specially true of the Acts of Parliament which refer to crimes and their punishments. They never lay down a principle as to responsibility, procedure, or evidence; they hardly ever define any large class of crimes: but they are full of definitions of different species of acts which subject men to punishment, and which were either not reached by the Common Law at all, or punished too severely, or not severely enough. The Statute Law on crime was, till lately, excessively intricate. It was, in fact, distributed over the whole Statute Book from the reign of Edward I. downwards. Much, however, has been done within the last thirty-five years to simplify and consolidate it, and it has the advantage of being readily accessible in a portable shape—for the statutes relating to Criminal Law have been collected and classified by Mr. Welsby in so efficient a manner, that Lord Campbell declared in the House of Lords that he never heard a statute cited in court which was not to be found in that collection. In speaking of the present state of the statutes upon crime, it is necessary to refer only to this work. Omitting all the merely formal parts of acts, and expunging repealed sections, but containing very full notes of the cases which have arisen upon the various enactments, it forms a volume, in royal octavo, of 269 pages, in which are printed, at full length, all the acts, or parts of acts, now in force and relating to the subject of crime, from the 1st Edward II., st. 2, to the 16 and 17 Vic., c. 121—i. e., from 1307 to 1853. The number of the statutes is 156.

With regard to the merits of the law itself, as distinguished from those of its administration, it may be said that though confused, irregular, and difficult to understand in the last degree, it is substantially good enough, though it must be admitted that the most important requisites of a good criminal system are so plain and so universally admitted, that it could hardly be otherwise. The Common Law definitions are, generally speaking, very bad, and some of the Common Law doctrines harsh and absurd; but the evil of bad definitions of crimes in quiet times is not a very important one to the public at large. An enormous majority of the crimes which occur

would fall within the loosest definition; and with respect to the cases in which a bad definition causes a failure of justice, it really matters very little whether you punish 17 thieves per 1000, or 16 and a very large fraction. Still it is not the less true that bad definitions of crimes are a serious evil. They bring discredit on the administration of justice, and they foster a sort of fraudulent and perverted ingenuity amongst legal practitioners which is very objectionable. They also induce jurymen to tamper with their oaths. There can be no doubt that this is the case with the definitions of murder and manslaughter. They are so grossly absurd that they are not and cannot be strictly acted upon. Very many cases of murder might be cited more venial than many cases of manslaughter; and the consequence is, that in practice, murder means a crime for which the jury think a man ought to be hung, and manslaughter one for which they think he ought not to be hung. Unless we are prepared to contend that the jury ought, in every instance, to assess the guilt of the prisoner according to their own views of the case, this cannot be regarded as a slight evil. It may be impossible to produce a definition which will entirely exclude hard cases; but there can be no doubt that, though the line can never be drawn perfectly, it might be much better drawn than it is. It must also be remembered that, in unquiet times, a loose definition of crime may shake the foundations of society. When Hastings hung Nuncomar, he used the law for a purpose for which it was never designed. Cases might well be imagined in which a partial jury and a vindictive government might hang an innocent man for murder without departing in the least degree from the law. Coroners' juries have more than once found verdicts of wilful murder against soldiers or policemen in times of popular excitement; and there can be no doubt at all that the law is so loose upon the subject that cases might occur in which such conduct would involve the courts and the government in the most serious embarassment. It would be no light thing to pardon a political partisan who was clearly a legal murderer, on the ground that the law of murder is absurd, and that juries had, as a general rule, had the good humor to perjure themselves so far as to call such offences manslaughter.

It would be impossible to obtain any general view of the character of English Criminal Law without some acquaintance with the character of its component parts, but the attainment

of such knowledge is merely a means to understanding the general character of its present administration; for the whole system would be most unfairly judged if the unquestionably irregular and confused outline of its doctrines were looked at, to the exclusion of all consideration of the manner in which they are brought to bear upon the actual transaction of business. It is only from a personal acquaintance with the transactions of criminal courts, or from an attentive and intelligent study of reports of their proceedings, that it is possible to form any opinion upon the subject worth having.

It is necessary, in order to understand any system, to consider the object which it proposes to accomplish; and it may be asserted with respect to Criminal Law, that the choice lies between two views of it. We may consider a criminal trial either as a public investigation, having for its object the ascertaining of the truth with a view to the infliction of punishment; or as a private litigation between two persons, one of whom tries to persuade the Judge that the other falls within a class against which the law has denounced certain punishments. These two views may, for the sake of distinctness and shortness, be called the inquisitorial and the litigious theories. In England, the litigious view of Criminal Law has gradually superseded the inquisitorial theory, and is at present the great leading principle which lies at the bottom of their whole criminal procedure.

It may be concluded that at the commencement of the last century, the feeling that a criminal trial was a litigious and not an inquisitorial proceeding, was established by the bitter experience of half a century; and the attention of the judges, placed at last in an independent position, was turned to the propriety of making the litigation fair for both parties. This tendency may be observed in some statutory provisions of the time — such, for example, as the Act giving the prisoner the benefit of counsel, and a right to a copy of the indictment in cases of high treason; but in the ordinary routine of the administration of criminal justice, the principle could only be realized by the process of judicial decision. The legislative powers which were and are exercised by the judges have at all periods of English legal history been important, and during the eighteenth century they were exercised with greater freedom and boldness than at present. The particular steps by which the existing system in England was established are very obscure; but it is an undoubted fact, that

whereas in criminal trials before the Revolution of 1688, no one of the present rules of evidence was well established, and none habitually observed, we find by the end of the century that the existing rules were established in all their rigor, though certainly not with their existing profusion of detail, which is for the most part the growth of the present century. It is also certain that one great principle upon which they proceeded was, that the same rules applied to criminal as to civil cases — in other words, they were founded expressly upon the litigious as opposed to the inquisitorial theory of criminal justice. Any one who will study the early volumes of the State Trials, and compare them with those which relate to the eighteenth century, will find abundant proof of the fact that the practice of the courts during the period uniformly tended to a systematic assimilation of criminal to civil trials. That this most important change was brought about by the judges in discharge of that qualified exercise of legislative power which the practice of the country intrusted to them, is proved by the absence of any express statement by the principal writers on Crown Law of the rules of evidence which now form so prominent and characteristic a part of the English system. Except in respect to questions of competence, Sir Matthew Hale says hardly anything on the subject; whilst Hawkins, Blackstone and Foster are equally silent. The effect of the rules of evidence may be briefly summed up by saying that they proceed upon the supposition that a criminal trial is an action between the plaintiff and the defendant, in which the judge is passive, merely regulating the proceedings and transmitting to the jury the statements of the opposite parties; and that they impose upon the plaintiff or prosecutor the obligation of adducing proofs of a certain determined kind, sufficiently powerful to leave upon the minds of the jury no reasonable doubt that the defendant or prisoner falls within a certain category. The only ministerial function performed by the judge is the apportionment of punishment; the rest of his office is purely judicial. As a plaintiff in a civil action, so the prosecutor in a criminal trial is to prove his case, and in doing so he receives no assistance from any public functionary whatever. In short, an English criminal trial may be considered as the discussion of the question: shall we grant the prosecutor's demand that the prisoner may be punished? In order to be able to secure the discussion of this question, the

prosecutor must, in the first place, satisfy the grand jury that it is a request which he has a right to make. The proceedings before the committing magistrate are conducted on precisely the same principle, and are calculated to give the prosecutor security that the prisoner shall be forthcoming when he is wanted; but he could, if he pleased, dispense with them altogether. The whole effect of English criminal procedure is to regulate the manner in which this request is to be put forward, and the terms on which it will be granted. In point of form, no doubt, the crown is in every case the prosecutor; but the real prosecutor has so entirely superseded the government in the character of plaintiff, that there is at least one important practical distinction between cases in which the crown's function is substantial and those in which it is only nominal. In the former, the counsel for the crown has a right to the last word, whether the prisoner calls witnesses or not.

The great cardinal principle of English criminal procedure is this. No request that a person may be punished shall be granted unless the person who makes it, by proofs of a particular kind, convinces beyond all reasonable doubt, twelve men selected in a particular manner, of the guilt of the person with respect to whom the request is made. It is needless in this place to say anything of the qualifications of jurors; therefore two points remain to which our attention must be directed:—What is the nature of the effect to be produced on the minds of the jury? What are the means of producing it which the law allows to be employed?

Every one would admit that evidence of guilt of some amount of cogency is necessary in order to warrant the infliction of punishment; and this raises a question as to what standard of cogency is to be adopted. Innumerable discussions have taken place upon this subject. Thus, for example, writers of considerable reputation have maintained that a conviction upon what is called circumstantial evidence is not justifiable unless the circumstances proved are inconsistent with the prisoner's innocence, — a condition which, in all human probability, never was and never will be fulfilled; whilst so great a man as Jeremy Bentham proposed that the jury should declare what were the odds as to the prisoner's guilt or innocence — whether five to one, seven to one, or ten to one, — and that unless a certain degree of probability (say, for example, seven to one) were reached, punishment

should not be inflicted. These are, perhaps, the most famous suggestions upon this subject which have been made in England; though under the Civil Law the evidence of two witnesses was required in capital cases, and a variety of rules were laid down about *plena* and *semiplena probatio*.

The question is one of grave practical importance, for it frequently gives rise to discussions which command a great deal of public attention in cases where a conviction — especially a conviction for murder — has been obtained upon circumstantial evidence; and proposals are frequently made, sometimes of the wildest kind, for restricting the powers of juries in cases which rest upon proofs of that description. We think that the confusion which exists upon the subject arises from the fact, that almost all writers upon it have attempted to estimate the force of evidence on a wrong principle. Their object has been to say, whenever such and such conditions are fulfilled, men will be convinced, and not otherwise. Therefore prisoners ought not to be convicted unless such and such conditions are fulfilled. The true principle appears to be to estimate the value of evidence entirely by the effect which it does in fact produce upon the minds of those who hear it. The value of evidence is surely measured as exactly by the state of mind which it produces, as a force is measured by the weight which it will lift. If a set of circumstances are put in evidence which, though consistent with the prisoner's innocence, leave no doubt at all in the minds of those who hear of them as to his guilt, the evidence does as much, produces as great an effect, and is therefore experimentally proved to be as strong as if they had been inconsistent with his innocence. It may, however, be said, that what will satisfy one man's mind will not satisfy another's, and that therefore such a test of the value of evidence, as its power of satisfying the minds of a jury, is indeterminate. This, no doubt, is true. It is an indeterminate test, but we can have no other. We cannot say no man shall be convicted unless there are six pounds or eight yards of evidence against him; and Bentham has conclusively shown that it is not much less foolish to require the evidence of two or of three witnesses, for innumerable cases may be put in which the evidence of a single man is from circumstances far weightier than that of several. Almost all language which does not apply to matters of weight and measure is indeterminate, but it is not therefore unmeaning. What is meant by a "safe"

bridge? Certainly not one which contains a few trifling flaws; for, probably, no bridge is quite free from imperfections. No one, however, could describe the varieties or degrees of imperfection which would render it unsafe. The phrase, however, is not only not unmeaning, but is capable of having a clear technical signification attached to it, for it would be easy to provide that any bridge should be considered "unsafe," which the surveyor of the district should adjudge to be so. The effect of the existing rules as to the amount of evidence necessary for conviction is precisely analogous to this. We all know what that state of mind is which we call doubt, and no definition would make it clearer to us than it is already, and we likewise all know what that state of mind is which we call certainty. We are therefore able to say, with respect to any given subject upon which we have thought, whether or no, as a matter of fact, our minds are in a state of doubt; and the law says that the amount of evidence necessary for a conviction is that amount, be it greater or less, which will place twelve jurymen in a state of certainty. This amount, of course, varies very much according to the composition of the jury, and therefore the test is an indeterminate one, though it is perfectly applicable. It may, however, be observed, that this view of the nature of the jury's functions supersedes the controversies to which we have referred respecting circumstantial evidence. On this view of the subject they become questions, not of principle, but of fact, and resolve themselves into an inquiry as to the character of the combinations of circumstances which have in point of fact satisfied juries of the guilt of accused persons.

A plausible objection to this view may be founded on the right which the judges exercise of directing an acquittal in cases in which the evidence breaks down upon a particular point, which practice may be said to indicate the necessity that some specific amount of evidence should be offered to the jury, and not merely such an amount as relieves their minds from doubt. The most remarkable instance of this which can be mentioned is Lord Cardigan's case,[1] in which the prisoner was acquitted by the House of Lords, acting on the advice of Lord Denman, because there was no evidence to show that the Harvey Garnett Phipps Tucket mentioned in the indictment was the same person as the Harvey Tucket

[1] 1 Townshend's Mod. St. Tr. 229, &c.

who was wounded on Wimbledon Common. Close attention will, however, show that this objection is only apparent. The judge has no power whatever to control the verdict of the jury. Even in the most extreme case of all — if no evidence were offered for the prosecution, and the jury chose to convict — the only remedy would be a pardon from the crown. Cases have occurred in Ireland, where the jury, under the influence of strong party feeling, persisted in convicting in the face of the judge's direction to acquit, and the court was obliged to take their verdict. The true explanation of the practice, as far as it relates to the present question, is, that the jury are to form their opinion from the evidence only, and not from general antecedent probabilities; and that the judge, whose mind is trained to the task, exercises the right of warning them of gaps in the chain of evidence which an uninstructed mind would fill up from extra-judicial considerations. A man is charged with shooting Harvey G. P. Tucket. It is proved that he shot Harvey Tucket. Upon what grounds would a reasonable man suppose that Harvey Tucket was also called Garnett Phipps? The indictment itself could be no proof of the facts which it alleged; and the only considerations which could remove the doubt would be quite independent of the evidence produced at the trial. They would be, for example, such as this—that it would be very unlikely that an indictment should be drawn up without any reference to any real fact; that it was a matter of universal notoriety that Lord Cardigan had shot a Mr. Tucket in a duel, and that nobody ever heard of his shooting more persons than one of that name; so that, in all probability, the person referred to by the evidence would be identical with the person named in the indictment. Now, it is one of the principal objects of the rules of evidence to withdraw such general considerations from the minds of the jury, and to obtain from them an account of the state of mind produced in them by evidence of a much narrower description. The practice, therefore, of which we are speaking, amounts to nothing more than a warning on the part of the judge, that the legitimate sources of opinion are failing the jury on a particular point, and that they must not have recourse to others. It is, moreover, a warning only, and not an express authoritative command, although no doubt it invariably acts as such.

Such being the nature of the result to be obtained, what

are the means by which the law allows it to be produced? They are limited by the famous system called the rules of evidence — rules, the objects of the most vehement attack and passionate defence. Though these rules have been applied to an infinite number of cases, and have been so overlaid with comments, illustrations, applications, and corollaries, that they form a large and complicated branch of the law, they are in themselves very few and very simple. They may, indeed, be reduced to the following principles: —*First*, the evidence must be confined to the point at issue — that is, it must tend to prove or to disprove some or one of the material averments of the indictment; *secondly*, the best possible evidence must be produced — for example, the contents of an existing writing must be proved by the production of the writing itself; *thirdly*, hearsay evidence of a fact is not admissible; *fourthly*, no one is bound to answer questions which criminate himself — an accused person may not be questioned at his trial — and as husband and wife are one person in law, they cannot be witnesses for or against each other.

The object of these rules is, first to restrict the quantity, and secondly to guarantee the quality of the evidence on which the jury are required to form an opinion. That they answer the first purpose most effectually cannot be doubted; and it is a most important one. If it were allowable to lay before a jury every consideration which could possibly affect their minds in relation to the guilt or innocence of an accused person, there would be no end to trials, and verdicts would ultimately be given from party feeling, prejudice, or a thousand other improper motives. Whether, as a general rule, they secure the second object, is a question of fact, which nothing but experience can decide. Perhaps two out of the four rules might be advantageously relaxed. For many reasons, the rule which makes an accused person or his wife incompetent witnesses, is a bad one; it affords a certain amount of protection to crime, and is a very great hardship on innocence. The very fact that suspicious circumstances are put in evidence is in substance, though not in form, an interrogation of the prisoner. It amounts to an inquiry whether he can give any explanations on the subject, and few things weigh more strongly against him than omission to do so. It would surely be better to ask the question in so many words than to do it covertly; and though it may be true that

a man will often lie to save himself, we must remember that the weight of testimony depends far more on its truth than on the credit of the person who gives it.

Besides these rules as to the nature of the evidence itself, there are several rules of great importance as to the mode in which it is to be elicited, which illustrate more clearly than any other part of the proceedings, the litigious character of English criminal justice, for they avowedly rest on the principle that the witness favors the party who calls him. The most important of these rules are, that the side which calls a witness must not ask him leading questions — questions, that is, which suggest the answer. So, too, a man is not at liberty to contradict his own witness, for to do so would be, to use the Scotch phrase, to "approbate and reprobate." It is asking the jury to believe so much of your own story (for it is the essence of the whole system to look upon the witness as the organ of the party calling him) as makes in your favor, and to disbelieve what makes against you. The most characteristic feature of all, and that in which the English differs most widely from the French system, is the circumstance that the evidence is produced and marshalled, not by the judge, but by the counsel who are the representatives of the litigant parties; and that, except in apportioning punishment or in the decisions of questions of law arising incidentally, the functions of the judge are entirely passive.

The influence of the litigious principle is as strongly marked in the rest of English criminal procedure as upon the rules of evidence. From the arrest of the prisoner down to the verdict of the jury, no public functionary is in any way bound to investigate his guilt, and the prosecutor receives no other assistance from the law in collecting his evidence, than he would have in a civil action. He is a mere private person, and has no official character whatever. When, as is frequently the case, a policeman is the prosecutor, his official position makes no kind of difference in his powers — his acts as prosecutor are in every respect as unofficial as those of any private person. The same principle applies in exactly the same manner to prosecutions conducted by the solicitor to the Treasury, as agent for the government. He has no advantage over any other solicitor, but prepares the case for trial exactly as a private attorney would in a civil action for damages. The only difference in principle between civil and criminal proceedings in the preliminary procedure is, that in

the latter the accused person is liable to be, and generally is, taken into custody; but this fact must be viewed in connection with two other circumstances, which give to it a character altogether different from that of the apparently analogous practice in France. In the first place, imprisonment before trial is intended exclusively for safe custody, and is not in any way whatever made subservient to the collection of evidence. It is only allowed after sufficient evidence has been given publicly, and subject to all the rules of evidence, to persuade a police magistrate or justice of the peace, who stands in no sort of official relation to the prosecutor, that a strong suspicion of the guilt of the accused person exists; and, in the second place, accused persons are bailable in England in all cases whatever, though a discretion exists as to taking bail — the principle being, that bail ought never to be refused when the appearance of the prisoner can be secured by it. In France, *délits* only are bailable, but *crimes* (which answer roughly to felonies) are not — the reason being, that with them the preliminary imprisonment is not merely precautionary, but is one of the principal means of obtaining evidence. It may further be added, that the practice (which in one or two cases still exists) of arrest on mesne process in civil actions was precisely analogous to that of committal for trial, except that it bore far more harshly on the defendant than the correlative practice bears on the prisoner.

When the case actually comes to trial, the recognition of the litigious principle is, if possible, still more express. The prosecutor and the prisoner almost exactly replace the plaintiff and defendant. If the prosecutor or his witnesses do not appear, or if the prosecutor offers no evidence, the prisoner is acquitted; and if he chooses to forfeit the sum in which he is bound over to prosecute, he can always defeat justice if he pleases. The rules which regulate the addresses of counsel to the jury, and the sharp division which exists between the evidence for the crown and the evidence for the prisoner — each side calling its own witnesses and eliciting their testimony by questions, and each in its turn cross-examining the witnesses called on the other side — are equally analogous to the proceedings in a civil action, and the judge is as entirely passive in the one case as in the other. The practice — almost peculiar to the English law — of never interrogating the prisoner, is to a great extent founded on the old rule (now abolished) which made the parties to actions

incompetent witnesses; and the parallel might, if necessary, be drawn out to almost any length.

We would not be understood to be indiscriminate eulogists of the English system of procedure. Heartily approving of its main principle, we think that it labors under many very grave practical defects. It is an admirable system if it is fully worked out, but this only happens when the accused person has money enough to avail himself of all the privileges which the law gives him. Palmer's trial was perhaps as perfect a specimen of a criminal proceeding as any time or country could produce. A man accused of no less than three distinct murders, and the object of the most vehement popular hatred, was tried for one of them without even a passing allusion to the other two. Every fact bearing on the case was brought out, either on the one side or the other, with perfect fullness, and marvellous clearness, and without the admission of a single redundant fact, or the exclusion of a single material one. The result is, no doubt, highly satisfactory; but it must be remembered that Palmer had friends who spent several thousand pounds in his defence, and that if he had been a poor man, he would have found it a terrible thing to have to defend himself against the law officers of the crown. The English system throws a very heavy task indeed on the poor and ignorant — the task of managing their own defence. It no doubt surrounds them with securities against a condemnation on weak grounds. It enacts, as a condition of inflicting punishment, what is often considered a foolishly high standard of proof. It allows a man ample opportunities for defending himself, but it does nothing whatever to help him in doing so. It must never be forgotten, that to question an innocent man is to assist him; or that in the confusion and distress incidental to a public trial it is a very difficult thing for the untrained intellect to seize the bearing of the various points of the evidence. The importance of this observation can only be appreciated by those who see the common, unromantic, uninteresting routine of ordinary criminal business. On these occasions, criminal procedure is a very different thing from what it is on the great legal field-days which attract universal attention. A great political trial for high treason or sedition, or a murder case in which the crown and the prisoner are represented by the most experienced members of all branches of the legal profession, shows the working of the rules of evidence, and

the character of the standard of certainty required by the jury, in a very different light from that in which the very same rules and principles are displayed by the trials which take place for petty offences at the Assizes or the Quarter Sessions. In Palmer's trial, for example, the fact that no explanation was given of the purchase of the strychnine was all but conclusive, because the defence was prepared with so much skill and care that it would certainly have been explained, if possible; but it is by no means equally clear that the absence of any explanation of some suspicious remark made by a man accused of fowl-stealing ought to weigh strongly against him, because it may very likely never have struck him that it was suspicious. Not one man in five who is tried, is defended, and not one in twenty has any very clear conception of the bearings of the evidence against him. To call upon the common run of criminals to defend themselves is a sort of mockery. To repeat a statement made elsewhere, —

"I cannot describe the difficulties under which such persons labor without resorting to a familiarity of illustration which I hope will be excused. The common run of criminal trials passes somewhat thus: — Ten or twelve awkward clowns looking, as a very eminent advocate once observed, like over-driven cattle, are crowded together in the dock. Their minds are confounded by formulas about challenging the jury, standing on their deliverance, and pleading to the indictment. The case is opened, and the witnesses called by a man to whom the whole process has become a mere routine, and whose very coolness must confuse and bewilder a densely ignorant and most deeply interested hearer. After the witness has been examined, comes a scene which most lawyers know by heart, but which I can never hear without pain. It is something to the following effect: —

"*Judge.*—Do you wish to ask the witness any question?

"*Prisoner.*—Yes, sir; I ask him this, my lord. I was walking down the lane with two other men, for I heard —

"*Judge.*—No, no; that's your defence. Ask him questions. You may say what you please to the jury afterwards, but now you must ask him questions.

"In other words, the prisoner is called upon without any previous practice to throw his defence into a series of interrogatories, duly marshalled both as to the persons to be asked and as to the subject to be inquired into, an accomplishment which trained lawyers often pass years in acquiring most imperfectly. After this interruption has occurred three or four times in the course of a trial, the prisoner is not unfrequently reduced to utter perplexity and forgetfulness, and thinks it respectful to be silent. Hardly any ignorant person can tell a story of the simplest kind without endless maundering, irrelevant, and extremely wearisome details, and hardly any judge has the patience to sift out the grain of wheat from the bushels of chaff which are on such occasions put before him."

It must not be forgotten, in relation to this matter, that

the standard of certainty required by juries in common cases is much lower than in matters of life and death. Nor is this at all to be regretted, for no one who considers the subject can doubt that the reasonableness or unreasonableness of suspending the judgment on a particular state of facts, depends very greatly on the importance of the consequence involved. If the object of taking a dose of medicine were to relieve a trifling ailment, all reasonable doubt as to the wisdom of taking it would be removed by very humble advice upon the matter; but if it were certain that the dose would either kill or cure the patient, the very same advice would go for very little. For these reasons, we should conjecture that the largest part of the very few wrong convictions which take place occur in obscure and uninteresting cases. It is not, however, in such cases alone that the English system bears hardly upon poor men. Trials for murder frequently occur, in which the nicest scientific questions arise, and in which the accused person is too poor to call skilled witnesses on his side of the question, or even in some cases to employ counsel. In the spring of the year 1857, a man named Nation was tried for murder at the Somersetshire Assizes. Amongst other things, a knife was found upon him, on the blade of which, Mr. Herapath, the well-known chemist, discovered, with a microscope, a scale, which, as he said, must have come from the inside of a human throat. Now, whether this opinion was true or not, no one who remembers Palmer's trial can doubt that if the prisoner had been rich enough, he might have called other medical men who would not have agreed in it. At the Bodmin Assizes a case recently occurred of a somewhat similar character. An old man was accused of poisoning his grandchild with phosphorus. Only a very few cases of the use of phosphorus as a poison have occurred, yet in this instance Mr. Herapath, who was called for the crown, was again the only witness. The case ended in an acquittal; but if the old man had been convicted, it would have been most unsatisfactory to have had only one-sided testimony on so difficult a subject. In this instance the prisoner could not even afford the expense of being defended by counsel, and, according to the common practice in such instances, a barrister was requested by the judge to undertake his defence on the spot. It is surely impossible that justice should be done to subjects involving such delicate questions, both legal and medical, on a moment's notice.

All these anomalies are direct consequences of the principle that a criminal trial is litigious, and might be easily removed by a little contrivance. The first and most serious defect would be, in a great measure, remedied by making the prisoner a competent witness, liable, like any other person, to be questioned according to the ordinary rules of evidence. The repugnance usually felt to this measure arises partly from an undefined and really unintelligible notion, that a man has a sort of right, as against society at large, to refuse to answer questions which might criminate himself without incurring suspicion by such conduct. It is a very difficult thing to argue against a feeling in favor of which no plausible reason can be suggested; but another ground upon which this proposal is objected to, is more intelligible; it is, that no one can be trusted to perform an operation so delicate. We do not see why the function might not be devolved upon the counsel. The counsel for the crown would, of course, be allowed to treat the prisoner as a hostile witness — that is, to ask him leading questions. Each side would use their discretion about calling him; and if the prisoner were not defended by counsel, his own statement might be treated, either by the counsel for the crown or by the judge, as evidence upon which he might be cross-examined. If the prisoner, being defended, were not called, this would be, under some circumstances, very suspicious. The principle of the competency of the parties to an action to testify in civil cases, is found to work extremely well, and it would be in strict accordance with the whole system to assimilate criminal proceedings to them.

The English system of criminal procedure undoubtedly errs more seriously, and much oftener, in acquitting the guilty than in convicting the innocent, and its defects in this particular are almost entirely the consequence of the want of any person officially bound to conduct prosecutions. The whole of this subject was elaborately discussed before a late committee of the House of Commons; and their recommendations, together with the evidence by which they are supported, are so easily accessible, that it is unnecessary to do more than refer to them.[1]

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[1] This article is reprinted, with alterations, from the Cambridge Prize Essays, 1857.

RECENT AMERICAN DECISIONS.

District Court of the United States.

District of Massachusetts.—(Prize.)

The Amy Warwick and Cargo.

J. L. Phipps & Co., Claimants.

Prize Practice.— Disposition of captured property pending the trial.

A detailed statement, supported by affidavits, is required of any party who asks leave to offer new and independent proof.

This rule does not apply where it is only sought to meet with counter proof to the same points, evidence introduced by an opponent.

In a case of further proof, the testimony was ordered to be taken in the form of depositions on interrogatories and cross-interrogatories, that being the more satisfactory form of proof.

Objections to the delivery of the captured property on bonds, to claimants.

In the decree lately made in this cause, the brig and a part of the cargo were condemned as enemy's property, being confessedly the property of permanent residents in Richmond, Va. The rest of the cargo, 4700 bags of coffee, is claimed by Messrs. Phipps & Co., an English house at Rio Janeiro, having a branch house in New York. After the hearing on the evidence *in preparatorio*, by which it appeared that this cargo was bought for a Richmond house, the claimants moved for leave to offer further proof, for the purpose of showing that they are neutrals; that they advanced about $15,000 to supply a deficit of funds to purchase this cargo, that they took and held the bills of lading in their own name, to protect their advance, and had not waived or parted with their legal title. This motion was supported by affidavits of the claimants' belief in those facts, and of their grounds for expecting to obtain the proof of them. The motion was allowed. The captors then moved that the order include a right to them to take counter proof to the same points. The claimants objected that the captors must file a motion, with affidavits, as had been required of them. Judge Sprague was of opinion that a detailed statement, supported by affidavits, was required of any party who asked leave to offer new and independent proof, but that the rule did not apply to a

party who only sought to meet with counter proof, to the same points, the evidence introduced by an opponent.

A question also arose whether the proofs should be by affidavits or in the form of depositions. The English and some American cases were referred to, as allowing affidavits in cases of what is technically called further proof, as distinguished from plea and proof. Judge Sprague said that without deciding that affidavits were inadmissible in cases of further proof, he should order the proofs in this case, as more satisfactory, to be taken by a commissioner, on interrogatories and cross-interrogatories. The order was accordingly made, allowing the claimants to take further proof to the points set forth in their motion, and the captors to take counter proofs to the same points, each to file interrogatories within three days, with three days for cross-interrogatories, the proofs to be returned on or before a day fixed.

The claimants now moved to have the cargo appraised and delivered to them on bonds. They claimed that the hearing *in preparatorio* being had, and they being allowed further proof, they were entitled to take the property on bonds, by the practice of prize courts. This was opposed by the captors, who moved for a decree for a sale of the cargo. Judge Sprague said there seemed to be serious objections to delivering captured property on bonds, to claimants, which had always weighed with prize courts. Before the hearing *in preparatorio*, it could not well be judicially known that the claimants were not enemies, or acting for enemies, or that they had such absolute title in the property as to be the persons to whom it should be restored, in case it should be decided to be no prize,—beside the consideration that the captured property might itself be evidence. If on the hearing, their claim remained in doubt on any of these points, why should they take the property rather than the captors? The court must be careful to deliver the property to none but actual owners, and persons who would not pass it to any enemy for whom they might act. There were other difficulties attending this course, in the general. It threw on the captors the risk of the sufficiency of the bondsmen at the time, and their continued solvency until a final decision in the appellate court. It gave the claimants the choice of abiding or not abiding by the appraisement. If it was low, they would adopt it and give bonds, and so make a profit at the expense of the captors. If the appraisement was to the full value, they might decline

to give the bonds. And there was always danger of undervaluation, not only by fraud, and by the pressure of interests in the trade, but from erroneous principles of estimation. A public sale was the best and fairest proof of value, and the funds in the registry, to be delivered to the parties finally decided to be entitled to it, was the most satisfactory course, where there were an special circumstances. But in this case, there was an especial objection to the delivery to these claimants. As the hearing left the case, and as the claimants proposed to place it on further proof, they held the legal title only to protect their advance, which was only about $10,000 out of a value of over $100,000. The residue they would hold in trust for an enemy. Being neutrals, their duty would be, after deducting their advance, to deliver the residue to the enemy. Now, the prize court of no nation could be expected to deliver captured property over to a neutral who held it in trust for an enemy. The most that a neutral claiming an interest can expect, is that his interest shall be protected. This is sufficiently done by allowing him to pay his advance out of the proceeds in the registry. Whether a prize court will respect such an interest, and whether there is such an interest in this case, are points to be argued and determined after the further proofs shall come in.

After this intimation of opinion from the court, the claimants made no objection to the captors' motion for a sale. A decree was accordingly made for a sale of all the cargo by the marshal, after notice in the chief commercial papers of New York and Boston.

R. H. Dana, Jr., for the captors; *S. Bartlett* and *E. Bangs* for the claimants.

A Quantity of Iron.

Moses B. Tower, Libellant.

Rights of salvors of wrecked property under an agreement with the owners as against intermeddlers.

After the ship *Maritana* was wrecked near the entrance of the harbor, last fall, an agreement was made between the owners of the vessel and cargo and the libellant, that he should save what he could and receive one-half of the proceeds as compensation. While performing this service, two schooners came to the place and began to pick up the cargo. The libellant notified them that he had the exclusive right to

salve the vessel and cargo, and forbade them; but they refused to desist, and picked up and brought to Boston a quantity of bolt and bar iron. The libellant then filed his libel against it, alleging that under the agreement the libellant had the exclusive right to salve the property; that the masters of the schooners had no right to interfere, and having been warned off, must be considered as intruders and wrongdoers; that they had no claim for compensation or salvage on the property they picked up; that their services and labor enured to the benefit of the libellant; that he was entitled to the same salvage on this iron as upon the cargo which he saved, and praying for a decree accordingly. An answer was filed for the owners, admitting the facts as alleged by the libellant, and his rights as claimed. The masters of the schooners were notified of the pendency of the suit, but did not appear.

By order of the court (Sprague J.) a decree was entered for the libellant, allowing him fifty per cent. of the proceeds of the iron as salvage, according to the prayer of the libel, with costs, and the balance was ordered to be paid to the owners.

F. C. Loring for libellant and owners.

Supreme Judicial Court of Massachusetts.—In Equity.

Before Hon. E. R. Hoar, Justice.

Taunton Copper Manufacturing Co. *v.* William Cook and the New Bedford Copper Co.

C. covenanted with the plaintiffs to continue in their employ five years as a maker of copper rollers, and during that time not to disclose any of the secrets of the plaintiffs' business. Before the expiration of the contract, C. abandoned the plaintiffs' service and engaged with the New Bedford Copper Company. An injunction was granted restraining C. from communicating any secrets of the plaintiffs' business, and also from engaging in the service of the New Bedford Company, and restraining said company from employing C. during his contract with the plaintiffs.

Bill in Equity, praying for an injunction. The bill alleged that the plaintiffs were manufacturers of copper rollers at Taunton, in the county of Bristol, under the name of Crocker, Brothers & Co., and that on the 25th day of August, 1860, they made a written contract under seal, with William Cook, one of the defendants, wherein, in consideration of $1,000 a year, he covenanted "to serve, abide, and continue with

and in the employ of the plaintiffs, for the term of five years from the date thereof, and during said term, that he would faithfully and diligently, according to his best skill and knowledge, exercise and employ himself in the business of the plaintiffs as a maker of copper rollers, and in all matters and things relating thereto, and in and about such other lawful business as the plaintiffs should from time to time require or direct;" and he further agreed that "during said time he would do all in his power to promote, and not to injure the business of the plaintiffs, and to keep the secrets of said business, and of the plaintiffs during said time, and not to impart, reveal, or communicate to any person anything relating to the business or interests of the plaintiffs."

The bill then averred that the contract had been faithfully performed by the plaintiffs, but that said Cook, on or about the 20th day of May, A. D. 1862, abandoned the service of the plaintiffs, and made a contract with the New Bedford Copper Company to make copper rollers for that corporation, and had disclosed, or was about to disclose to them, their agents or servants, the secrets of the plaintiffs' business, whereby their interests might be greatly injured; and that the remedy at law against said Cook for breach of said contract would be entirely inadequate, both because of the difficulty of correctly estimating the damages, and of the entire irresponsibility of Cook to respond to any judgment for damages they might recover against him. The complainants therefore prayed for an injunction restraining Cook from communicating to the New Bedford Company any of the secrets of the plaintiffs' business, and also from working for said company during the time of his contract with the plaintiffs.

On the 24th May, 1862, his honor, Judge Hoar, granted the injunction, *ex parte*, as to the communication of the secrets of the business, and issued an order of notice upon both defendants, to appear before him, June 7th, to show cause why the whole injunction asked for should not be granted. Both defendants appeared and filed their answers, denying that there were any secrets in the plaintiffs' business that said Cook was about to communicate, or that the New Bedford Copper Company did not already possess, and that the contract of Cook with the plaintiffs was a hard bargain, not to be enforced in equity, and they moved to dissolve the injunction already granted, and that no other injunction should be granted.

At the hearing, the evidence tended to prove that copper rollers were manufactured at no other place in America, except at Taunton; that the plaintiffs procured the machinery for making them in England about 1838, and soon after employed Cook to come to this country, and that he had ever since been in their employ; that the plaintiffs had made some improvements in the machinery for their manufacture, which were not used or known elsewhere, unless taken from their works; but that aside from their peculiar machinery, there was no secret or mystery about making rollers, although their manufacture involved an unusual degree of care and skill. The making of the contract with the plaintiffs, as alleged in the bill, and the subsequent contract of Cook with the New Bedford Company, were not denied.

J. H. Clifford and *Ellis Ames*, for the defendants.

1. The injunction already granted should be dissolved. The evidence discloses no "secrets" of making copper rollers. It is simply a question of mechanical skill. But if there are any such secrets, the evidence shows that they were secrets of Cook, and not communicated to him by the plaintiffs. The New Bedford Copper Company are already informed and understand the manufacture of copper rollers, without any communication from Cook of the mode in which they are made at the plaintiffs' works.

2. The injunction should not be granted restraining Cook from working for the New Bedford Company. Courts of equity do not enforce the performance, or enjoin the violation of covenants merely personal in their character. *Kemble* v. *Kean*, 6 Sim. 333; *Kimberley* v. *Jennings*, 6 *Sim.* 340; *Hamblin* v. *Dinneford*, 2 Edw. Ch. R. 529; *Sanquirico* v. *Benedetti*, 1 Barbour, 315; *Haight* v. *Badgeley*, 15 Barbour, 499; *De Rivafinoli* v. *Corsetti*, 4 Paige, Ch. R. 264; *Fredericks* v. *Mayer*, 13 How. Pr. Rep. 566, and 1 Bosw. 227; *Clarke* v. *Price*, 2 Wilson, Ch. R. 137. Unless a contract can be specifically enforced on the one side, its violation will not be enjoined on the other. *Hill* v. *Crolls*, 2 Phillips, Ch. R. 52. But no court of equity would order the plaintiffs to furnish work for Cook for five years. There is, therefore, no mutuality.

Besides, here is no negative covenant in this contract not to work for any other company, as was the case in *Lumley* v. *Wagner*, relied upon by the plaintiffs. The lord chancellor *there* said he should not grant the injunction, except for the

fact of such explicit negative covenant. And if there were such a covenant here, the doctrine of that case ought not to be introduced into America.

Edmund H. Bennett, for the plaintiffs.

The remedy at law, for breach of the contract, is inadequate. The damages are in their nature future, contingent, continuing, and difficult to correctly estimate. This is itself a ground for the interference of a court of equity. Story Eq. Jur. § 722, *a*.

Besides, the insolvency of a party breaking his contract, and his inability to repay the damages he is about to cause, is a recognized cause for the protection of a court of equity. *Clark* v. *Flint*, 22 Pick. 238; *Winnipisseogee Lake Co.* v. *Worster*, 9 Foster, 449.

The present injunction therefore should not be dissolved; as the duty not to impart the secrets of the plaintiffs' business rests not only on the implied obligation arising from the relation of employer and employed, as in *Yovatt* v. *Winyard*, 1 Jac. & Walk. 395; *Exit* v. *Price*, 1 Sim. 483; but there is here superadded a positive covenant not to do so, as in *Morison* v. *Moat*, 9 Hare, 241, and 6 Eng. Law & Eq. R. 14; affirmed on appeal in 9 Eng. Law & Eq. R. 182. The covenant of Cook not to do anything to injure the plantiffs' business may be enforced in equity not only against himself, but also against those to whom he is about to communicate important information. *Barfield* v. *Nicholson*, 2 Sim. & Stuart, 1, which was decided entirely on the ground of a violation of the defendants' contract, and not on the ground of copyright.

The further injunction should be granted restraining the defendant Cook from making copper rollers for the defendants during the unexpired term of his contract with the plaintiffs. *Lumley* v. *Wagner*, 5 De Gex & Small, 485; affirmed on appeal, 1 De Gex, Mac. & Gord. 604; 13 Eng. Law & Eq. R. 252, overruling the earlier cases relied upon by the defendants. It is true there is no covenant here in terms not to work for any other person than the plaintiffs, but there is a covenant to "*abide* and *continue*" in their employ for five years; words necessarily implying a negative; besides, there is a covenant "not to injure" the plaintiffs' business.

There is nothing in the character of personal contracts, which prevents a court of equity from enjoining their violation. Thus, a contract by a husband, who has separated

from his wife, not to visit or molest her. *Sanders* v. *Rodway*, 13 Eng. Law & Eq. R. 463; 16 Beavan, 207. Contracts by persons not to practice their profession, as physicians, attorneys, &c., are constantly enforced in equity. *Butler* v. *Burleson*, 16 Verm. 176; *Giles* v. *Hart*, 22 Law Rep. 693; *Duigan* v. *Walker*, 5 Jur. (N. S.) 976. These cases rest upon the ground of contract in the party enjoined, and not upon that of any prior relation as partners between the parties. *Churton* v. *Douglass*, Johnson, 174.

The counsel for both parties also cited and commented upon *Martin* v. *Nulkin*, 2 P. Wms. 266; *Morris* v. *Colman*, 18 Ves. 437; *Dietrichsen* v. *Cabburn*, 2 Ph. 52; *Rolfe* v. *Rolfe*, 15 Sim. 88; *Ball* v. *Coggs*, 1 Brown, P. C. 140; *Vickery* v. *Welsh*, 19 Pick. 523; *Pilkington* v. *Scott*, 15 M. & W. 657; *Abernethy* v. *Hutchinson*, 1 Hall & Twells, 28; 3 Law Journ. Ch. 209; *Storer* v. *Great Western Railway Co.*, 2 Y. & C. Ch. R. 48; *Prince Albert* v. *Strange*, 2 Mac. & Gord.

Hoar J. declined to dissolve the injunction already issued, and ordered an additional injunction to issue forbidding the respondent Cook from engaging in the service of the New Bedford Copper Company, and also forbidding the New Bedford Copper Company from employing said Cook until the further order of the court.

RECENT ENGLISH CASES.

[Nov. 12, 14, 1861; Jan. 30, 1862.

JONES *v.* TAPLING.

Easement — Ancient lights — Encroachment — Right to obstruct.

Where the owner of a dominant tenement has exceeded the limits of his admitted right to the access of light and air by enlarging and altering ancient windows and opening additional ones, so that the owner of the servient tenement cannot obstruct the excess without at the same time obstructing that portion of the windows which occupy the site of the ancient windows,

Held, That no action can be maintained for the latter obstruction, although one of the ancient windows, so obstructed, has been left entirely unaltered.

Where the owner of the dominant tenement, after such excess has been obstructed by the erection of a permanent building, does away with the excess by blocking up the new windows and restoring the altered ones to their original state,

Held, per ERLE C. J., and WILLIAMS J., that an action will lie for continuing the obstruction on the ground that when the need to obstruct the excess ceases, the justification of the obstruction to the admitted right also ceases.

Per BYLES and KEATING J. J., that no such action will lie.

Per BYLES J., on the ground that the plaintiff by his conduct induced the defendant reasonably to believe that he intended permanently to continue his lights in their altered state, on the faith of which the defendant erected a permanent building on his own land.

Per KEATING J., on the ground that non-user indicative of abandonment or essential mis-user prejudicial to the servient owner, remits him to his former territorial rights.

This was an action for obstructing and keeping obstructed certain lights in the west side of a warehouse, No. 107, Wood Street, Cheapside, in the city of London. The cause came on to be tried before the Lord Chief Justice Cockburn, at the Guildhall in February, 1859, and a verdict was taken by consent for the plaintiff for the damages claimed, subject to the following case: —

Case. — The plaintiff is a wholesale dealer in silk, and now carries on his business at Nos. 107, 108, and 109 Wood Street, aforesaid. The plaintiff had for several years prior to 1857, carried on his business at 108 and 109 Wood Street, but he acquired possession of the premises No. 107 Wood Street, for the first time in the year 1857, having become the

purchaser of them in the month of July, in that year. Up to the time when the plaintiff acquired possession of the premises No. 107, they were used and occupied as a public-house, known by the sign of the Magpie and Pewter Platter, and were and are in a line with and next adjoining to Nos. 108 and 109. The said premises, 107, 108, and 109, abut on the rear on the west side thereof upon the east side of certain premises fronting in Gresham Street west, and therein numbered 1 to 8 — hereinafter called the Gresham Street property. In the year 1852, the plaintiff pulled down his premises Nos. 108 and 109 Wood Street, which were then old and dilapidated houses, and erected on their site new warehouses. In doing so he altered the position and enlarged the dimensions of the windows previously existing, increased the height of the building, and set back the rear or back line of those warehouses. The defendant, who is a carpet warehouseman, on the 23d of July, 1852, was tenant of the said Gresham Street property, and now holds the same under a lease for a term of 81 years, since granted to him. In and about the year 1856, the defendant pulled down the buildings then standing on the Gresham Street property, in order to erect thereon a warehouse. The plaintiff in July, 1859, immediately after his purchase of No. 107 Wood Street, made alterations in it by lowering the first and second floors, so as to make them correspond with his adjoining new warehouses, Nos. 108 and 109, and by lowering two of the windows in such floors so as to suit the new position of the floors. One of the lowered windows was about one foot longer than before, and the other about the same size as the old one, and both occupied new apertures. A small window on the first floor was blocked up. He also built two additional stories to No. 107, in the first of which — viz. the fourth story of his premises — he put out a new window; in the fifth or attic story he placed a window extending across the entire width of the building. These new windows and lights were so situated that it was impossible for the owner of the said Gresham Street property to obstruct or block them without also obstructing or blocking to an equal or greater extent that portion of the said windows and lights which occupied the site of the said ancient windows in No. 107. The said alterations and additions in No. 107 Wood Street, so far as the windows are concerned, were completed by the plaintiff in the month of August, 1857. After the alteration and

additions to No. 107 Wood Street had been so completed, the defendant proceeded to erect his said intended warehouse and premises on the Gresham Street property, and built up the eastern wall thereof to such a height as to obstruct the whole of the windows and lights of No. 107 Wood Street. The new windows of No. 107 could not have been obstructed in a more convenient manner than by building up a wall of sufficient height on defendant's premises. On the 8th of September, 1857, the following letter was written by the attorneys for the defendant to the attorneys for the plaintiff, and received by the latter: —

"Dear Sir, — We have received your notice (such notice not bearing on the present occasion). Our client claims the right to erect his warehouse in any manner he thinks proper without being interfered with by Mr. Jones. You are aware that when Mr. Jones erected his present warehouse in 1854, he, much to the annoyance of our client, put out the present windows in the back front of Nos. 108 and 109 Wood Street; at the time he did so, he was cautioned that when Mr. Tapling rebuilt his warehouse, which he then contemplated doing, these windows would be all built against." [After some further remarks, not necessary to recite here, the letter continues]. "Mr. Jones has, during the present month, put out additional windows overlooking our client's property. This he has no right to do, and we object to their remaining, and shall assuredly take measures to block them out."

Whilst the first eastern wall of the defendant's warehouse and premises was in course of erection, the following correspondence passed between the attorneys on both sides, from the plaintiff to the defendant: — "My client, Mr. Jones, finds that, notwithstanding the various proceedings taken by him to prevent Mr. Tapling from building against him and darkening his lights, he still continues to do so, and is raising a wall in Flying Horse Court to a much greater height than the former ones complained of; and he desires me to require of him to desist from his conduct, and to inform you that he will consider the same as an aggravation of the injury he is sustaining, and will apply to the court to restrain him in his proceedings, and to be ordered to pull down such wall so as not to further darken his premises." Defendant's attorneys, in reply to the above, after repeating what was said in their former letter, continued — "You are aware that when Mr. Jones erected his present warehouse in 1854, he, much to

the annoyance of our client, put out the present windows in the back front of Nos. 108 and 109 Wood Street. At this time he (Mr. Jones) was cautioned that when our client rebuilt his warehouse, which he then contemplated, these windows would all be built against. We deny that your client has any easement over Mr. Tapling's property. With respect to No. 107 Wood Street, we gave you notice at the time Mr. Jones was making the alterations and additions, about a month or six weeks since, that Mr. Tapling objected to the additional windows overlooking his property, and that Mr. Jones had no right to put them out. We further inform you that our client will take measures to block them out."

In reply to this the plaintiff denied that any such caution had ever been given by the defendant. The said eastern wall of the defendant's new warehouse and premises was completed by the end of October, 1857. Shortly before the 4th of February, 1858, the plaintiff, by advice of counsel, caused the altered windows in No. 107 Wood Street to be restored to their original state, and the new windows in the upper story to be blocked up. The mode in which such new windows have been blocked up has been by filling up the spaces with brickwork. On the 4th of February another letter was written by plaintiff's attorney to the defendant, stating that the plaintiff had not blocked up any lights, respecting which there might exist the slightest question, and requiring the defendant to pull down his walls. The defendant refused to remove the said eastern wall of his warehouse and premises, or any part of it, and it still remains. The question for the opinion of the court is, whether the plaintiff is entitled to recover in respect of the obstruction of light and air complained of. If they are of opinion that he is so entitled, then the verdict entered for the plaintiff is to stand, and the damages to be reduced to 40*s*. If they think the plaintiff is not so entitled, then the verdict entered for the plaintiff is to be set aside and entered for defendant.

There were also models of the premises which were made part of the case. It appeared by these models, in addition to what had been stated, that one window of No. 107 Wood Street was untouched by any alterations.

Cleasby, for the plaintiff.—First, the plaintiff, by altering his old windows and putting out new ones, has not lost his easement either by encroachment or abandonment. There is no authority for saying that an easement of this kind can be

lost by encroachment; and the plaintiff cannot be said to have shown an intention of abandoning his easement by an act, the object of which was to extend that easement. In *Moore* v. *Rawson*, 3 B. & C. 332, the owner of the dominant tenement showed his intention to abandon his easement by building a blank wall. *Chandler* v. *Thompson*, 3 Campb. 80, is distinctly in favor of the plaintiff. That case is recognized in *Blanchard* v. *Bridges*, 4 Ad. & E. 176, in which case the window was altogether different from the old windows. In *Hutchinson* v. *Copestake*, 31 L. J. C. P. 19, 9 W. R. 318, 896, no one of the new windows occupied the same position as the ancient ones, and a majority of the judges in the Exchequer Chamber (Blackburn J., and Channell and Bramwell BB.), rest their judgment solely on that ground. Blackburn, J., in delivering the judgment of himself and Channell B., expressly guards against being supposed to decide that the owner of adjacent land has a right "to use it so as to block up an ancient unaltered window, on the ground that the person who has a right to that window has also opened a new one in such a position that the owner of the adjacent land must either block up the ancient window, or submit to the enjoyment without interruption of the new window, so as, after twenty years, to make the right to the new window indefeasible." In the present case there was an ancient window left unaltered, and the opinion of those three judges must be taken to be in favor of the plaintiff. Secondly, if the defendant had a right to obstruct the windows in their altered state, he has no right to continue the obstruction now that the plaintiff has restored them to their original condition. On this point Lord Campbell's judgment in *Renshaw* v. *Bean*, 18 Q. B. 112, is in favor of the defendant. The right to obstruct is a strict right, and if exercised, it must be taken with the liability the law attaches to it—*i. e.* the liability to remove the obstruction when the cause which justified that obstruction is removed. He also cited *Garritt* v. *Sharp*, 3 Ad. & E. 325; *Cawkwell* v. *Russell*, 26 L. J. Ex. 34; and *Cooper* v. *Hubbock*, 9 W. R. 352.

Archibald for the defendant.—On the authority of *Renshaw* v. *Bean*, and *Hutchinson* v. *Copestake*, the defendant had a right to put up the obstruction complained of. As to the right to continue the obstruction, the erecting of such an obstruction is merely the exercise of the *dominium* of building up to

his boundary which every one possesses unless limited by some easement; and if after the existence of an easement limiting this *dominium*, he is again entitled to exercise it as before, it must be because his property is discharged from the easement. [BYLES J.—Can it not be by suspension of the easement?] It is submitted that it cannot. The servient tenement must be taken to be for a time discharged of the easement, if the owner is remitted to his original *dominium*, and has a right to erect what he pleases on his own land. How then can he afterwards be compelled to pull it down? Easements may be looked upon as implied grants upon condition, by which view many decisions apparently at variance may be reconciled. In those cases where the excess of user works no detriment to the servient tenement, or can be obstructed without obstructing the lawful user, no injury is done to the easement by such excess; but where the excess is inseparable from the user, and cannot be interfered with without obstructing the lawful user, it must be taken that the condition of the implied grant is that the grant shall be void upon the commission of such excess. For example, in rights of way, which require continuous acts to support them, the mere encroachment is easily separable from the right, and therefore works no forfeiture of the easement. And again in *Luttrell's case*, 4 Coke, 86 a, the change in the easement worked no detriment. So if a man enlarge his ancient windows by lowering them, this is not done under cover of the easement, because the excess is separable, and can be obstructed without obstructing the old window. There is another argument from the hardship to the defendant. The only way known to our law by which he can prevent his neighbor from acquiring an unlimited easement of light over his property is by erecting obstructions, and that being a lawful act and the only means by which he can protect his property, it would be very unjust if the plaintiff could throw upon him the expense of pulling down the obstruction, to be erected again as often as the encroachment is repeated.

The following authorities were also cited:—Gale on Easements, 375 (2d ed.); *Barker* v. *Johnson*, 4 B & Ald. 440; *Liggins* v. *Inge*, 7 Bing. 682; *Williams* v. *Morland*, 2 B. & C. 910; *Lawrence* v. *Obee*, 3 Camp. 514; *Pickard* v. *Sears*, 6 Ad. & E. 469.

Cleasby was heard in reply.

Cur. adv. vult.

Jan. 30.—KEATING J.—This was a special case stated in an action for obstructing and keeping obstructed certain lights of the plaintiff's. In 1857, the plaintiff became possessed of No. 107 Wood Street, in the city of London, then a public-house three stories high, with one window in each story, and in that year made alterations in it, by lowering the first and second floors so as to make them correspond with those of his adjoining warehouses, then recently erected, and lowering the windows in those floors in a similar way, one window of the three being retained in its original position. He then added two new stories, opening in the first of them a new window, and in the highest another window or light, which extended across the entire width of the building, the whole of which was thus made to form part of his warehouses. The defendant, after their completion, proceeded in altering his own buildings to erect a wall to such a height as to obstruct the whole of the said windows and lights. It was found as a fact, that the obstruction could not have been made in a more convenient manner, and that it was impossible to have obstructed the new lights without at the same time obstructing the ancient window. The wall of the defendant's new warehouses and premises constituting the obstruction was completed at the end of October, 1857. During the months of September and October, 1847, a correspondence took place between the attorneys for the plaintiff and defendant respectively, the former denying and the latter asserting the defendant's right to build the obstruction in question. Previous to the 4th of February, 1858, the plaintiff, under the advice of counsel, blocked up the new windows and restored the altered windows to their original size and position, and upon that day the plaintiff's attorney gave to the defendant notice that he had done so, calling upon the defendant to remove the obstruction. This the defendant refused to do; whereupon the present action was commenced on the 24th of February, 1858. Upon these facts two questions arise—first, was defendant justified in erecting the obstruction complained of, and if so, secondly, was he justified in continuing it after the notice of the 4th of February. As to the first point, had the alteration made by the plaintiff consisted wholly in the enlargement of all the ancient windows of No. 107, in the manner stated, the question would have been concluded in favor of the defendant, by the cases of *Renshaw* v. *Bean*, and *Hutchinson* v. *Copestake*, in error; but inasmuch as, whilst altering the ancient windows in two of

the stories of his warehouse, and opening new ones in the additional stories, the plaintiff retained one ancient window unaltered, it becomes necessary to consider the point, upon which three of the judges in the case in error expressly reserved their opinion, and to decide whether, in order to justify the obstruction, there is any substantial distinction between the cases—where the alteration consists in acquiring new and unprivileged light by means of the enlargement of ancient windows, and that, in which such new light is acquired by the addition of new windows, the effect of the alteration upon the servient tenement in each case being the same. I concur with the rest of the court in the opinion that there is no real distinction between the two cases, and that the grounds upon which the judgment in *Renshaw* v. *Bean*, and that of Mr. Justice Crompton and Mr. Justice Hill in *Hutchinson* v. *Copestake*, proceeded, and which recognize no such distinction, are quite satisfactory. But, assuming the defendant was justified in erecting the obstruction complained of, was he also justified under the circumstances in continuing it after notice that the plaintiff had closed up the new windows, and restored those altered to their original position and dimensions? a question undoubtedly of difficulty and importance. The English law is so peculiar in its provisions respecting lights, that in considering a question of any novelty relating to them, little assistance can be derived from analogies that might be furnished by the laws of other countries. I am not aware of any other system of law, by which the remedy of the owner of land for an invasion of its privacy, by his neighbor opening new windows upon it, is confined to their obstruction; but it is certain that by our law the only mode by which an owner of land can prevent his neighbor from acquiring the right to light through windows looking upon it is by exercising his own right of building upon his own land, so as to obstruct them. His omission to do so within twenty years, gives to his neighbors a right to the light, and deprives himself of the right to interfere by building or otherwise with that state of things to which he is then taken conclusively to have assented. The state of the law as to the nature of the right of the dominant and servient owners respectively is thus clearly stated by Mr. Justice Littledale in his judgment in the case of *Moore* v. *Rawson*, 3 B. & C. 340. After referring to the right of obstruction within twenty years, the judgment thus proceeds:—"But if the light be suffered to pass

without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It would appear, therefore, that the consent implied by law from the uninterrupted user of light for twenty years is not a consent on the part of the servient owner that the enjoyment shall continue without obstruction for any given time, but only so long as the specific mode of user to which he has assented shall continue. Accordingly, it was held in *Moore* v. *Rawson*, that although twenty years' user is indispensable to the acquisition of a right to light, yet such right may be lost by a disuser for a shorter period. In that case, the plaintiff having a building with ancient lights, used as a weaver's shop, pulled it down, and erected on the same site a stable, afterwards used as a wheelwright's shop, having a blank wall next the defendant's land. Fourteen years afterwards defendant built upon his own land, and the plaintiff then opened a window in the same place where there had been one in the old wall. It was held that he could not recover for continuing the obstruction to such window, on the ground that the fact of his dis-user or ceasing to enjoy the right unaccompanied by any act at the time indicating an intention to resume the enjoyment within a reasonable time, operated as an abandonment of the right—extinguished it. "I think," said Mr. Justice Bayley, "that according to the doctrine of modern times, we must consider the enjoyment as giving the right, and that it is a wholesome and wise qualification of that rule to say that the ceasing to enjoy destroys the right, unless at the time when the party discontinued the enjoyment he does some act to show that he means to resume it within a reasonable time." This case was before the Prescription Act, 2 & 3 Will. 4, c. 71; but that statute, which increases so much the facilities for acquiring the rights to light in certain cases, ought certainly not to be construed so as to lessen the rights of the servient owner more than its enactments strictly require. The case, too, was one of non-user, or ceasing to enjoy; but the case of *Garritt* v. *Sharp* was one of mis-user, or alterations decided since the statute, and where the same principle was applied. There the plaintiff had stopped up some ancient apertures in a barn through

which light and air were furnished to it, and converted others into latticed windows, and brought his action for the obstruction of the latter. Lord Chief Justice Tindal, who tried the cause, in effect directed the jury that if the defendant had obstructed any portion of the light admitted through the original apertures, the plaintiff was entitled to damages for such dimunition. A new trial was granted upon the ground that the jury were not required by the judge to consider whether the plaintiff had essentially varied the manner in which the light was enjoyed. "It is enough to say," said Lord Denman, in delivering the judgment of the court (of which Mr. Justice Littledale was still a member), "that a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether." In *Blanchard* v. *Bridges*, the acts of the dominant owner, which were held to take away the right, were undoubtedly very strong; but the case is important as showing how entirely the foundation of the right to light since the Prescription Act is the same as before it. Mr. Justice Patteson, in delivering the judgment of the court clearly lays it down that the acts of the owner of the land from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and, as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. That such alteration by the dominant owner as obliges the servient proprietor in obstructing the unprivileged light to obstruct likewise that which was privileged, will take away the right, at least for the time, was distinctly decided by the Court of Queen's Bench in *Renshaw* v. *Bean*, where it was held that such an alteration was a defence under a traverse of the right; and that principle (in cases where the windows had all been enlarged) was affirmed by the Exchequer Chamber in *Hutchinson* v. *Copestake*. It appears to me, therefore, that these authorities show the true principle upon which the rights of owners of adjoining lands in respect of lights acquired by user are placed—namely, that the rights of the servient owner in respect of his land being limited only by the user, to which he has assented, and for so long only as it is substantially adhered to, the non-user by the dominant owner is indicative of an abandonment of the right so acquired by him, and its essential mis-user, to the prejudice of the servient proprietor, does not so much confer upon the latter any new rights of obstruction as that it remits

him to his former territorial rights, to the extent to which those conditions have been violated, upon which alone his consent to their limitation was given; and that his exercise of such his rights can never be questioned by the dominant owner. The result would be that the solution of the second question in the present case would depend upon the answer given to the first, and be in favor of the defendant; it is true that in such cases as the present the effect of applying the principle as above stated operates practically as an extinguishment of the former right; but surely there is nothing unjust or unreasonable in requiring that a person who exercises a right in derogation of that of his neighbor, by that neighbor's implied consent, should adhere substantially to the terms upon which it was given, especially in a case where the statute makes the implication of consent from user so imperative, and where the temptation to usurpation by the dominant owner is as great as its effects are injurious to the servient proprietor. It seems to me that such a state of the law is most reasonable, and that a man should not be heard to complain of the consequences of an act the necessity for which has been created by himself. I am not aware of any existing decision opposed to such a view. *Chandler* v. *Thompson* was much relied on. If it decides nothing more than that, the excess there being severable, the obstruction ought to have been confined to it, the case may well stand. If it decides more, then it has been overruled by *Renshaw* v. *Bean* and *Hutchinson* v. *Copestake* (see the remarks of Kindersley V. C., in *Wilson* v. *Townend*, 30 L. J. Ch. 283, 9 W. R. 30); the same observation is applicable to *Cotterell* v. *Griffiths*, 4 Esp. 69. As to *Thomas* v. *Thomas*, the report of it in 5 Tyrwh. 804, shows that the observation of Alderson B. was not applicable to the present case, and the casual expression attributed to the Lord Chief Baron, to be found in the judgment to *Cawkwell* v. *Russell*, is clearly extra-judicial, nor is the case itself to be found in the contemporary reports. The judgment in *Renshaw* v. *Bean*, after disclaiming the intention to decide "that the plaintiff, by the alteration of his windows, had entirely lost the right which he had before enjoyed," does certainly go on to say, that in consequence of his own acts "he must be considered to lose the former right which he had, at all events until he shall, by himself doing away with the excess and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his building as not to interfere with the admitted right;" but that this passage cannot

have been intended as the expression of an opinion that a restoration of the plaintiff's windows to their former state would oblige the defendant to take down the building he had rightfully erected, is evident, not only from the improbability of the court deciding a point not necessarily involved in the case before it, but likewise from the explanation given in the latter part of the judgment of this very passage, where, after deciding that the acts of the defendant were a defence upon a traverse of the right, it proceeds to give the reason as follows:—"For as we have already observed in the outset, the plaintiff has, by his own act of excess, at all events suspended and lost for the time his former right, if he has not actually and wholly destroyed it." It is not perhaps easy to see how the right can be lost even for a time, unless it be actually and wholly destroyed. Then what are the circumstances of the present case, with reference to the authorities? When the plaintiff became the owner of No. 107, it was a public-house three stories high, with one window in each story. He raises it two stories, changing the levels of the floors to suit the adjoining warehouse of which he makes it part, enlarging some windows, adding others, and more than doubling the quantity of light. He makes this entire change in the character of the building and lights with the intention of so enjoying them—not only does he do no act indicating at the time an intention to resume the old state of things, but, on the contrary, all his acts negative any such intention to restore the former state of things, and he insists on his right to maintain the state of things as altered; and it is not until nearly three months after the completion of the defendant's building that, in pursuance of the advice of counsel, he restored the windows to a state manifestly inadequate to the permanent building in the altered form in which he still retains it; and he then calls upon the defendant to pull down the building which, *ex concessis*, he has rightfully erected. I am unable to discover any principle of jurisprudence upon which he can be made to do so consistently with the foundation of the plaintiff's right being that which the authorities state it to be. If the law allowed the defendant to resist the usurpation by an action, then the principles upon which a restoration of the former state of things might preserve the right is sufficiently obvious; but the difficulty is to see how a rightful act of ownership by the defendant on his own land can be rendered illegal by the act of the plaintiff, to which he is no party. If that effect is to follow, within what time must it take place?

For how long does the plaintiff possess the right of restoration so as to have this effect; and is the time to run from the alteration in the plaintiff's windows, or from the time of the building on defendant's land? If the restoration be partial is the demolition to be so likewise? Or suppose (what in the present case is highly probable) that the plaintiff, having compelled the defendant to take down his building, then re-opens the windows—is the defendant to build another wall, or is he to submit to the usurpation? These, and many other difficulties which might be suggested, oppose themselves to the maintenance of the plaintiff's claim on the present occasion, a claim which, if established, will, as it appears to me, simply enable a dominant owner, by a dexterous use of the decision, to increase the servitude upon his neighbor's land to any extent he pleases. In my opinion the defendant is entitled to the judgment of this court.

Byles J.—I am of opinion that the defendant is entitled to the judgment of the court. The plaintiff having altered the dimensions, shape, and position of nearly all his windows, it became necessary for the defendant, in order to escape the burthen of a new servitude, to block all the plaintiff's windows to the extent to which he has blocked them. That he had a right to do so while the new lights were open, I believe we are all agreed. The remaining question is whether the defendant has a right to continue his obstruction after the plaintiff has restored his windows to their original condition. In order to decide this question in favor of the defendant, it is not necessary to decide that the whole original right was by the common law subject to an implied condition that no part of it should be varied in its exercise to the prejudice of the servient owner, and that if its exercise be so varied the whole original right is forfeited, or abandoned forever. I hesitate to arrive at this conclusion on a point of such general and vital importance in great cities like this metropolis, but desire here to express no opinion upon it. It is, I think, sufficient to say that in the case under consideration, the defendant, at the time he built, did no unlawful act. And the plaintiff, both by his conduct and by his letters, represented to the defendant and induced the defendant reasonably to believe that he (the plaintiff) intended permanently to continue his lights in their altered condition, in which condition a permanent erection by the defendant would never become a legal injury to the plaintiff. It will be observed that the plaintiff rebuilds

his house in a substantial manner, probably calculated to last a century or more, with a general arrangement internally and externally adapted to the new lights, and unfitted for the old lights. This appears to me equivalent to a representation by the plaintiff to the defendant to this effect:—"I have, permanently, substituted new lights for my old ones; and if you do not permanently block the new lights, I shall eventually establish on your property a new servitude." The written correspondence between the parties, before the defendant's erections were complete, carries the defendant's case further; for although the plaintiff disputes the defendant's right to block the new lights (in which controversy we are all agreed that the plaintiff was wrong), yet he nowhere informs the defendant that he (the plaintiff) is about to abolish his new lights, and to restore his ancient ones, but on the contrary, asserts the right of the new ones. The defendant, therefore, both by the words and actions of the plaintiff, has been encouraged and induced to lay out a sum of money in erecting a permanent building on his own ground, and it would be inequitable if the plaintiff after this should be allowed to say, "I have at length altered my mind. Now, therefore, pull your buildings down." Whatever time is to be allowed to the dominant owner to change his mind, it surely cannot extend beyond the period at which the servient owner has completed a substantial building on the faith of the continuance of permanent buildings already erected by the dominant owner. If it can extend beyond that period, what reasonable limit can be assigned to the caprice of the dominant owner? I do not rest the defendant's case on the ground of *license*, as in *Liggins* v. *Inge*, but on the ground of a representation by the plaintiff of a state of facts, which, if correct, would justify the defendant in expending money in erecting substantial buildings on his own land. The case bears a strong analogy to those cases of constructive fraud in equity, where an owner of land without any evil intention induces or allows another to build or expend money on that land, under the mistaken supposition that it is his own land. But the case before the court is stronger in two respects than that case. For here the defendant's use of his own ground was strictly lawful at the time when he built, and the representation here is partly of facts that are true, and partly of intentions lying in the exclusive knowledge of the plaintiff, so that no inquiry by the defendant could possibly have improved his

knowledge or bettered his condition. But this conclusion in favor of the defendant seems to me fortified by the authorities. If instead of a frontage containing new lights the plaintiff had built a blank wall with no lights therein, evincing thereby that he did not intend to resume his easement, and the defendant had accordingly built on his own land, as he has done, then the case of *Moore* v. *Rawson* shows that the plaintiff's easement is gone. It seems to me that the case before the court is the same in principle with the case of *Moore* v. *Rawson*. It does not follow that the legal effect of the plaintiff's re-instatement of his premises would have been the same if the defendant, instead of erecting a substantial brick structure for his own purposes, had merely put up a temporary board to shelter himself from the threatened servitude, and for no other purpose, which board might have been both erected and taken down at scarcely any expense. In such a case the board is purposely so erected, that it may be removed as soon as the danger is over. The dominant owner violates no law by opening new windows, and the blind of the servient owner as soon as the new windows are removed has effectually accomplished all that the servient owner intended. That is a case in which the servient owner suffers no injury.

WILLIAMS J.—In this case I agree on both points with the judgments of my Lord Chief Justice, which he has allowed me to read. As to the first point, I think the authorities have established a doctrine so as to be indisputable, unless in a court of error, that where the owner of the dominant tenement has exceeded the limits of his admitted right to the access of light and air, either by enlarging or altering an ancient window, or opening an additional one, and has thereby put himself into such a position as that the excess cannot be obstructed without at the same time obstructing the admitted right, no action can be maintained for the latter obstruction, because it was unavoidably caused by the exercise of that right of the owner of the servient tenement to obstruct the excess, if he shall think fit to incur the trouble and expense of thus using his own land. And these grounds would, I think, afford a good plea by way of justification in an action for the obstruction of the admitted right. But, secondly, I am of opinion that as soon as the owner of the dominant tenement has done away with the excess by restoring his lights to their former state, so that the need to obstruct excess ceases, the justification of the obstruction to the admitted

right also ceases. And the circumstance of the defendant having chosen, in order to secure the more convenient enjoyment of his property, to incur the expense of erecting the obstruction, does not, in my opinion, justify him in continuing it. The act of the plaintiff in opening the new window, which led to the erection, was a legal act, of which the defendant had no legal right whatever to complain. Now, can it be said that the obstruction was erected with the license or assent, express or implied, of the plaintiff? It was erected plainly against his will and in opposition to his wishes. For these reasons I am of opinion that the plaintiff is entitled to our judgment.

ERLE C. J.—In this case these were the material facts. The plaintiff having a right to an old window opposite the defendant's premises, opened new windows in a line above it, and finished his alterations in August, 1857. The defendant, during September and October, 1857, built, at considerable expense, a wall and warehouse high enough to obstruct the new window, and in so doing necessarily obstructed the old window, the wall and warehouse being a convenient mode of obstructing the new window. The plaintiff, in February, 1858, stopped up the new windows, and restored his premises to their former state, and required the defendant to take away the obstruction to the old window. During these operations the correspondence showed that the plaintiff had no intention either to abandon any right or to grant a license to the defendant to continue his building. The defendant refused to remove the obstruction, and in an action consequent thereon, the question has been whether, under the circumstances, the continuance of the obstruction is lawful. Upon the first point, whether the obstruction of the old window was originally lawful, my answer is in the affirmative, upon the authority of *Renshaw* v. *Bean*, and *Hutchinson* v. *Copestake*, and for the reason stated below. But upon the second point, whether the continuance of the obstruction was lawful, after the premises of the plaintiff had been restored to their former condition, my answer is in the negative. The new light in the plaintiff's tenement would, if continued, have imposed a new servitude on the defendant's tenement. This the defendant had a right to prevent by obstruction, obstruction being the only method of prevention known by law. But when the cause which made the obstruction lawful was removed in the time and manner above stated, it seems to me that the law-

fulness of the obstruction ceased also. The defendant contended, that the opening of a new window, under the circumstances above stated, was either in the nature of an abandonment of the right in respect of the old window, or was in the nature of a license to the defendant to build without regard to any former easement, and so was a restoration of full dominion to the defendant freed from the former servitude. The answer is that the acts of the plaintiff show an intention the reverse of abandoning any existing right to light, as his endeavor was to obtain an increase. His acts and the correspondence entirely negative any intention either of abandoning, or licensing, or of freeing the defendant's tenement from servitude; and if he had no such intention, the cases of *Moore* v. *Rawson*, and *Liggins* v. *Inge*, have no application, seeing that they were founded upon the presumed intention of the plaintiff, in the first case, of abandoning his easements permanently, and in the second, of granting a license to the defendant which had been executed with expense on his land, and was, therefore, irrevocable. The defendant contended, further, that the right to the passage of light over the land of another must be regarded as if it was derived from a grant on condition that it should be lost if the grantee made an attempt by encroachment to acquire a right to an increase of light in such a manner, that a permanent structure obstructing both the privileged and unprivileged lights became the convenient mode of preventing the acquisition of a right to the increase, but no authority has been cited to show that the right to light is presumed by law to rest upon a grant conditioned to be void, if an attempt to encroach should be made. The right is often created by grant, as when two adjoining houses pass to separate grantees from the same grantor either in fee or for a less estate. If the forfeiture of the right so granted, resulted from an enlargement of an old or the addition of a new window, the opportunity of enforcing such forfeiture must often have occurred; but no trace of a claim thereto has been found. Moreover, the right to a light is frequently derived under the statute from twenty years' user; but in that statute there is no recognition of a liability to forfeiture if an attempt to increase the servitude should be made. Still, although no authority has been found, the defendant contends that the principle is a necessary consequence of the doctrine established by the late cases of *Renshaw* v. *Bean* and *Hutchinson* v. *Copestake;* and to maintain this contention he

relies on considerations of convenience. He argues that if the plaintiff gave occasion for a permanent obstruction by an attempt to impose a servitude on the defendant, he ought not to have the option of rendering by an arbitrary act an expensive permanent obstruction which was lawfully made, unlawful, and a cause of action, the restoration of his own premises being a matter that existed entirely on his own risk, unconnected with any communication with the defendant; and if the action lies, not only is the expense of the defendant in building thrown away, but he is also made liable to damages. There is great weight in this argument, but it seems to me that there is a greater weight in the answer. The plaintiff, in opening a new window, does a lawful act, and the defendant, if he chooses to obstruct it, also does a lawful act. The new window is entirely unconnected with the easement belonging to the old window, and the defendant is only excused from obstructing the old window if he cannot otherwise obstruct the new window. The obstruction can be effected for the most part by a temporary block at slight expense; and if the right of obstructing the old window is limited to the necessity of obstructing the new window, it is in its nature a temporary justification of that which would otherwise be an actionable wrong, and the defendant would act at his peril, if he chose, with such a limited right, to be at great expense for a permanent structure. There is a hardship in allowing to the plaintiff an option of rendering an act of ownership by the defendant, which was perfectly lawful when it was done, unlawful by a change which the plaintiff chooses to make in his own premises. But there seems a greater hardship in making a new window in an upper story a forfeiture forever of a right to light for the windows below it. The new window may be made under a belief of right, as where the houses are held under long leases from the same landlord, who gives his consent to an alteration in the windows of one house. This would make the alteration lawful against every one except the tenant of the adjoining house for the residue of his term (see *Davies* v. *Marshall*, 9 W. R. 368), or where the houses are so far apart that it is doubtful whether the new window in the dominant tenement is an increase of the servitude of the servient tenement; so if the new light is only a slight inconvenience, the matter may be expected to be compromised. The hardship of depriving a house of accustomed light possibly to such an extent as to render it useless

as a house by reason of an act intended to be lawful, is greater than that of throwing the expense of the obstruction on the party obstructing. The facts and dates here indicate both that the plaintiff believed he had a right to the new window, and also that the defendant believed he had a right to obstruct both the old and new windows; their respective rights were at the time doubtful, and have since been settled only so far as *Hutchinson* v. *Copestake* is decisive. In conclusion, it may be observed that the hardship in cases like the present would be prevented, if an action were allowed by the servient tenant, either to try the right to a new window or to recover from the dominant tenant the expenses reasonably incurred in protecting his tenement from the attempted encroachment. For these reasons, I think that the verdict for the plaintiff should stand.[1]

Judgment accordingly.

Crown Case Reserved.

April 26, 1862.

REGINA v. FRANCIS FRETWELL.

Murder—Death resulting from taking poison to procure abortion —Accessory—Self-murder.

A married woman having become pregnant by the prisoner, and having herself unsuccessfully endeavored to procure a poison in order to produce abortion, the prisoner, under the influence of threats by the woman of self-destruction if the means of producing abortion were not supplied to her, procured for her a poison, from the effects of which, having taken it for the purpose aforesaid, she died. The prisoner neither administered the poison, nor caused it to be administered, nor was he present when it was taken, but he procured and delivered it to the deceased with a knowledge of the purpose to which the woman intended to apply it, and he was accessory before the fact to her taking it for that purpose.

Held, that the prisoner was not guilty of murder; that the case was distinguishable from *Regina* v. *Russell*, 1 Mood. C. C. 356.

Quære, whether the woman was guilty of self-murder.

Case reserved by COCKBURN C. J.:—

"Francis Fretwell was indicted and tried before me at the last assizes for the county of Nottingham for the wilful mur-

[1] See the following American authorities:—Atkins v. Bordman, 2 Met. 475; Fifty Associates v. Tudor, 6 Gray, 20; Carrig v. Dee, 14 Gray, 583; Rogers v. Sawin, 10 Gray, not yet published; Mass. Gen. Sts., c. 90, § 32; Story v. Odin, 12 Mass. 157; Collier v. Pierce, 7 Gray, 18; Atkins v. Chilson, 7 Met. 398; Parker v. Foote, 19 Wend. 309; Myers v. Gemmell, 10 Barb. 537; Ray v. Lynes, 10 Alabama, 63; Pierce v Fernald, 26 Maine, 436; Ingraham v. Hutchinson, 2 Conn. 597; 3 Kent Comm. 448.

der of Elizabeth Bradley. The deceased had died from the effects of corrosive sublimate taken for the purpose of producing abortion. The poison had been procured for her by the prisoner, with full knowledge of the purpose to which it was to be applied; but there was ground for believing that the prisoner, in procuring the poison, had acted at the instigation of the deceased and under the influence of threats by her of self-destruction if the means of producing abortion were not supplied to her. She was a married woman, living in service, separately from her husband, and had become pregnant by the prisoner. She had endeavored to purchase corrosive sublimate herself, but the druggists to whom she had applied having refused to furnish it to her, she urged the prisoner to procure it. The prisoner was not present when the poison was taken. The facts in question occurred in the month of July, 1861, anterior to the coming into operation of the 24 & 25 Vict. c. 94. The jury, upon questions specially put to them by me upon the evidence, expressly negatived the fact of the prisoner having administered the poison to the deceased, or caused it to be taken by her. They found specially, that the prisoner procured the poison and delivered it to the deceased, with a knowledge of the purpose to which she intended to apply it, and that he was therefore accessory before the fact to her taking poison for the purpose of procuring abortion.

"Upon this finding I directed the jury to return a verdict of wilful murder against the prisoner, reserving for the consideration and decision of the court of criminal appeal whether such verdict was right in point of law. In giving such direction I acted in deference to the authority of the case of *Regina* v. *Russell*, 1 Mood. C. C. 356; but it appearing to me doubtful how far the ruling of the judges in that case, that if poison be taken by a woman to produce abortion and death ensues the woman is *felo de se*, could be upheld; and still more so, how far a man accessory to the misdemeanor of a woman in taking poison for the purpose of producing abortion can properly be held to be accessory to the self-murder of the woman, if, contrary to the intention of the parties, death should be the consequence, I have reserved these points for the consideration of the court.

"A further question arises as to the admissibility of the depositions of the deceased, upon which the case against the

prisoner mainly depended. Her evidence having been taken on a charge against the prisoner of having administered or caused to be taken poison in order to produce abortion, it was objected that the depositions were not admissible on the present charge, as being substantially different from the one on which the evidence had been taken. I was disposed to think that, the transaction being the same, the evidence was admissible, although, in consequence of the death of the woman having supervened, the charge had assumed a different shape and character. I, however, reserved this question also for the consideration of the court."

No counsel appeared in this case.

Erle C. J. delivered the following judgment: — The prisoner was convicted of murder, and the question was whether, upon the facts, he was properly convicted. The deceased, Elizabeth Bradley, was pregnant, and took a dose of corrosive sublimate for the purpose of producing abortion. The sublimate had been procured for her by the prisoner in the full knowledge of the purpose for which it was to be applied. The prisoner in procuring the poison had acted at the instigation of the deceased, and under the influence of threats of self-destruction if the means to procure abortion were not supplied to her. Then the case set out the motives which induced the woman to be desirous of preventing her state being known. The jury negatived the fact of the prisoner having administered the poison to the deceased, or caused it to be taken by her; but said that he had delivered it to her with the knowledge of the purpose to which she intended to apply it, and that he was therefore accessory to her taking the poison for the purpose of procuring abortion. The Chief Justice of the Queen's Bench, in deference to the authority of *Regina* v. *Russell*, 1 Mood. C. C. 356, directed a verdict of wilful murder, but reserved the case. The facts of the present case differ materially from the facts in that case. There, the prisoner, finding the woman to be pregnant, procured arsenic for the purpose of procuring abortion, and she knowingly took it with the purpose of procuring abortion, and it caused her death. The judges held that if a woman takes poison with intent to procure miscarriage, and dies of it, she is guilty of self-murder; and that a person who furnishes her with the poison for that purpose will, if absent when she takes it, be accessory before the fact only; but as the prisoner in that case could not have been tried as

accessory before the fact before 7 Geo. 4, c. 64, s. 9, he was not triable for a substantive felony under that act. In the present case there appears to be a very marked distinction between the conduct of the prisoner Fretwell and the conduct of the prisoner Russell. In the present case the prisoner was unwilling that she should take the poison; it was at her instigation and under the threat of self-destruction that he procured it and supplied it to her; but it was found that he did not administer it to her or cause her to take it, and it would be consistent with the facts of the case that he hoped she would change her mind; and it might well be that the prisoner hoped and expected that she would not resort to it. The court do not think it necessary to lay down the law whether the person taking poison under such circumstances is guilty of *felo de se*. The provisions of the late statute fortify the decision of the court in the present case. His opinion was that the prisoner was not guilty of murder, and that the conviction must be reversed.

The other members of the court concurred.

Conviction quashed.

LEGAL NOTES AND ANECDOTES.

With respect to criminal law, it is clearly established, that the name or nature of the property stolen, or damaged, is matter of essential description. A diverting instance of the application of this rule, and one which forcibly illustrates the advantage of allowing amendments, occurred a few years back at the assizes for Hertford. A man was charged with stealing "a slop." The theft was clearly proved, but, when called upon for his defence, the prisoner exclaimed, "Why, my lord, it ain't no slop." "You hear what he says," observed the judge, addressing the jury. "Is it a slop, gentlemen?" "No, my lord, it's a smock," said one of the jurymen. "Then you must acquit the prisoner." He was acquitted; but the grand jury not being discharged, a second indictment was preferred and found, charging him with stealing "a smock." Nothing daunted, the prisoner now pleaded *autrefois acquit*, and called several witnesses to prove that the article he had stolen was in fact a slop, and

this question was submitted to a second jury with much gravity by the learned judge.[1]

Though evidence addressed to the senses; if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices; and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions, or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions, which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirist, and many amusing illustrations of its effect might be cited from the best authors. Shakespeare makes Jack Cade's nobility rest on this foundation; for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, "was by a beggar-woman stolen away," "became a bricklayer, when he came to age," and was his father, one of the rioters confirms the story, by saying, "Sir, he made a chimney in my father's house, and the *bricks* are alive at this day to testify it; therefore deny it not." Archbishop Whately, who makes use of the above anecdote in his diverting "Historic Doubts relative to Napoleon Buonaparte," adds, "Truly this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold." So, in the interesting story of "The Amber Witch," the poor girl charged with witchcraft, after complaining that she was the victim of the sheriff, who wished to do "wantonness with her," added, that he had come to her dungeon the night before for that purpose, and had struggled with her, "whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, whereupon he had left her." To this the sheriff replied, "That it was his little lap-dog, called Below, which had scratched him, while he played with it that very morning,

[1] 28 Law Magazine, 12, 13.

and having *produced the dog*, the court were satisfied with the truth of his explanation.[1]

The rigid enforcement of the rule regarding professional communications, no doubt operates occasionally to the exclusion of truth; but if any law reformer feels inclined to condemn the rule on this ground, he will do well to reflect on the eloquent language of the Lord Justice Knight Bruce, who, while discussing this subject on a recent occasion, felicitously observed, "Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."[2]

There is no precise rule respecting the degree of intelligence and knowledge which will render a child a competent witness; and, in these cases, much must ever depend upon the good sense and discretion of the judge. The utter want of discretion in dealing with this subject, which is occasionally evinced by the inferior functionaries of the law, has been admirably ridiculed by Dickens, in his "Bleak House." A little crossing-sweeper being brought up before a coroner, to give evidence on an inquest, the narrative thus proceeds: — "'Name Jo. Nothing else that he knows on. * * * Know's a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him arter he's dead if he tells a lie to the gentlemen, but believes it'll be something wery bad to punish him, and sarve him right—and so, he'll tell the truth.' 'This won't do, gentlemen,' says the coroner, with a melancholy shake of the head. 'Don't you think you can receive his evidence, sir?' asks an attentive juryman. Out, of the question,' says the coroner; 'you have heard the boy; *can't exactly say* won't do, you know. We can't take *that* in a court of justice, gentlemen. It's *terrible depravity*. Put the boy aside.' Boy put aside; to the great edification of the

[1] Amber Witch, translated by Lady Duff Gordon, p. 78–80.
[2] Pearse *v.* Pearse, 1 De Gex. & Sm. 28, 29.

audience, especially of little Swills, the comic vocalist."—P. 104.

An indictment will sometimes fail to be sustainable on the ground of *remoteness*. For instance — If the trustees of a road neglect to repair it in pursuance of powers vested in them by statute, and a person passing along the road is accidentally killed by reason of the omission to repair, the trustees are not indictable for manslaughter, for "not only must the neglect to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect."[1] Again: G., by falsely pretending that he was a naval officer, induced B. to enter into a contract to provide him with board and lodging at so much per week, in pursuance whereof he was supplied with food. Held, that G. could not be convicted of obtaining certain specified articles of food by false pretences — the supply of the food being too remotely the result of the false pretence.[2]

The intrinsic weakness of hearsay evidence is one of the reasons why it is inadmissible.

> Pluris est oculatus testis unus, quam auriti decem;
> Qui audiunt, audita dicunt, qui vident, planè sciunt.
>
> PLAUT. *Trucu.*, *Act* 2, *Scene* 6, Lines 8, 9.

"The writer of a dictionary," says Jean Paul Richter,[3] "rises every morning, like the sun, to move past some little star in his zodiac; a new letter is to him like a new year's festival, the conclusion of the old one a harvest home; and since after each capital letter the whole alphabet follows successively, he may sometimes celebrate on one and the same day a Sunday, a Lady-day, and a Crispin's holiday."

We have in Plautus a very characteristic sketch of a burglar: —

> Quam magis specto, minus placet mihi hominis facies; mira sunt,
> Ni illic homo' est aut dormitator, aut sector zonarius;
> Loca contemplat, circumspectat sese, atque ædes noscitat;
> Credo, ædepol, quo mox furatum veniat, speculatur loca.
>
> *Trinummus*, *Act* 4. 2. 20.

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[1] Regina *v.* Pocock, 17 Q. B. 34, 39.

[2] Regina *v.* Gardner, Dearsly & Bell, 40.

[3] Quoted in a review of Bouvier's Law Dictionary in The North American Review, July, 1861, p. 74.

The best case, says Southey, which I have seen of law *versus* justice and common sense, is one which Montaigne relates as having happened in his own days. Some men were condemned to death for murder: the judges were then informed by the officers of an inferior court, that certain persons in their custody had confessed themselves guilty of the murder in question, and had told so circumstantial a tale that the fact was placed beyond all doubt. Nevertheless it was deemed so bad a precedent, to revoke a sentence and show that the law could err, that the innocent men were delivered over to execution.—Liv. 3, chap. 17; tom. 9, p. 128.

"Their practice [the lawyers'] may truly be called practice, and nothing but practice, for no state of life is so troublesome and laborious as theirs; such days of essoyn, such days of appearance; so many writs, so many actions, so many offices, so many courts, so many motions, such judgments, such orders: — What throngs and multitudes of clients daily attend them! I commend the wisdom of our forefathers, who close by the Hall erected a church, where they might take the open air, and find it as empty as they left the other peopled and furnished. How are they continually busied! I could heartily wish that there were more minutes in the hour, more hours in the day, more days in the week, more weeks in the year, more years in their age that at length they might find out some spare time to serve God, to intend the actions of nature, to take their own ease and recreation. For now they are overbusied in their bricks and their straw, to lay the foundation of their own names and gentility; that, teaching other men their land-marks and bounds, they may likewise intend their own private inclosures. Well fare the scholar's contentment, who if he enjoy nothing else, yet surely he doth enjoy himself."[1]

"It is also very often seen, that such as are nominated to be of these inquests, [jury] do, after their charge received, seldom or never eat or drink, until they have agreed upon their verdict, and yielded it up unto the judge of whom they received the charge; by means whereof sometimes it cometh to pass that divers of the inquest have been well near famished, or at least taken such a sickness thereby, as they have hardly

[1] Goodman's Fall of Man, p. 171.

avoided. And this cometh by practice, when the one side feareth the sequel, and therefore conveyeth some one or more into the jury, that will in his behalf never yield unto the rest, but of set purpose put them to this trouble."[1]

There is a well-known judgment of MAULE, J., when a difference of opinion existed among the members of the bench. "I agree," said this caustic judge, "with the conclusions of my brother A., for the reasons offered by my brothers B. and C."

"Surplusage," said the same eminent judge, in that happy mode in which he combined wit and wisdom, "is that which does not help at all, as if you were to state that a man had a *blue coat on and* did a certain thing; but it is not surplusage to say, that the defendant knocked the plaintiff down, and *also* tore his clothes, and *also* put his eye out."[2]

"They (corporations) cannot commit trespass nor be outlawed nor excommunicate, for they have no souls."—10 Rep. 32 b.[3]

NOTICES OF NEW PUBLICATIONS.

A TREATISE ON THE LAW OF EVIDENCE, as administered in England and Ireland; with Illustrations from the American and other Foreign Laws. Third Edition. By JOHN PITT TAYLOR, ESQ., Judge of the County Courts for Lambeth, Greenwich, and Woolwich. In Two Volumes, Royal 8vo. 1860. pp. 1675. London: W. Maxwell.

This is the best English Treatise on the Law of Evidence ever published. It is founded on Professor Greenleaf's book. The author informs us in his preface, that he has adopted, "with but few alterations, his excellent general arrangement, and followed, to a considerable extent, the course even of his sections, and borrowed many pages of his terse and luminous writing." The author has scrupulously referred in the notes to those portions of Greenleaf on Evidence of which he has availed himself. Judge Taylor has exhibited great assiduity and research in collecting, sifting, and examining the English cases on the subject. In no sense can his work be said to be a mere index to works of authority, a criticism which is often and truly made of English text-books; but it is a clear, full, and exact statement of the Law of Evidence, by an accomplished legal writer; and as such we commend it to the attention of the profession.

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[1] Holinshed's Chronicles, — England, vol. 1, p. 262.

[2] Aldis *v.* Mason, 11 C. B. 139.

[3] The most recent English cases have decided that an action will lie at the suit of or against a corporation for a libel. Whitfield *v.* South-Eastern Railway Co., 27 L. J. Q. B. 229; Metropolitan Omnibus Co. *v.* Hawkins, 28 L. J. Ex. 201.

CROWN CASES RESERVED FOR CONSIDERATION, and Decided by the Judges of England. To Hilary Term, 1862. By the Hon. E. CHANDOS LEIGH, and LEWIS W. CAVE, Esq. London: V. & R. Stevens, Sons, & Haynes; Swett; and Maxwell. 1862. Vol. 1. Part II. 8vo. pp. 80.

This part includes the sixteen cases that have been decided from the beginning of Michaelmas Term, 1861, to the end of Hilary Term, 1862.

In *Regina* v. *Webster*, p. 77, it was decided that if a part owner of property steals it from A., in whose sole custody it is, and who is solely responsible for its safety, he is guilty of larceny; and the property is well laid in A. alone, although he is also a part owner of the property stolen. WILLIAMS J. said: "There is a case where a man was convicted of stealing his own goods from his own servant. How do you distinguish this case from that?" This case is in conflict with *Commonwealth* v. *Morse*, 14 Mass. 217, which wrongly decided, that where a bailee of a sheriff received from him personal chattels which had been attached, giving an accountable receipt with a promise to re-deliver the same on demand, that the bailee had no such special property in the chattels as to support an indictment for larceny from such bailee.

The prisoner obtained sheep by false pretences in Middlesex, and subsequently removed them into the county of Essex, where he was apprehended. *Held*, that the Court of Quarter Sessions for the county of Essex had no jurisdiction to try the offence. *Regina* v. *Stanbury*, 128.

A girl, eighteen years of age, was taken in labor in the house of her step-father during his absence. The mother omitted to procure for her the assistance of a midwife, in consequence of which the girl died. There was no evidence that the mother had the means to pay the midwife. *Held*, That she was not legally bound to procure the aid of a midwife, and that she could not be convicted of manslaughter for not doing so. *Regina* v. *Shepherd*, p. 147. ERLE C. J.: "We have to see whether, on the facts stated to us, there was an omission of any duty rendering the prisoner liable to be convicted of felony. It is important that the boundaries of crime should be well defined. They are not so definite as they might be in cases of negligence; and our duty is to consider and see whether there are any facts here to bring the case within the principle of any of the cases where the omission of a duty resulting in death has been held to be manslaughter. * * * I cannot find any authority for saying that there was such a breach of duty as renders the prisoner, in the event which ensued, liable to the consequences of manslaughter." With reference to the form of the indictment, WILLIAMS J. remarked: "It would have been sufficient, if the indictment had shown facts from which the duty would arise, without setting forth the duty itself. The duty might be implied by law from the facts stated." As to the degree of duty which renders one responsible for death in cases of neglect, see 2 Bishop Crim. Law, §§ 599–610.

In *Regina* v. *Dring*, Dearsly & Bell, 329, husband and wife were indicted for jointly receiving. The jury found both guilty, and found also that the

In *Regina* v. *Woodward*, p. 122, the prisoner was convicted of receiving stolen goods. The thief delivered the goods to the prisoner's wife in the absence of her husband; and she paid him sixpence on account. Afterwards the prisoner met the thief, and, with a guilty knowledge, agreed with him for the price, and paid the balance. *Held*, That the conviction was right. wife received the goods without the control or knowledge of the husband, and apart from him; and that "he afterwards adopted his wife's receipt." It was held that this finding did not warrant the conviction of the husband. The distinction between the two cases is this: In Dring's case, the jury

found that the husband adopted the act of the wife; and the conviction was held bad, because the word "adopted" was too general, and might mean merely a passive adoption. In Woodward's case there was an active adoption.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
		1862.	Returned by
Averill, Ebenezer (1)	Boston,	May 13,	Isaac Ames.
Baker, James	Dennis,	April 1,	J. M. Day.
Bancroft, Trueman G.	Boston,	May 9,	Isaac Ames.
Brown, John N.	Roxbury,	" 27,	George White.
Brown, William B.	Marblehead,	" 15,	George F. Choate.
Carter, Edward	Boston,	" 16,	Isaac Ames.
Case, Nehemiah B.	N. Reading,	" 7,	William A. Richardson.
Chase, H. Lincoln (2)	Newton,	" 3,	Isaac Ames.
Chase, Irah, Jr. (2)	Roxbury,	" 3,	Isaac Ames.
Clark, Levi C.	Malden,	" 31,	William A. Richardson.
Curtis, Charles, Jr.	N. Bridgewater,	" 17,	William H. Wood.
Davis, Joseph C.	Charlestown,	" 14,	William A. Richardson.
Emerson, William P.	Boston,	" 9,	Isaac Ames.
Estabrook, George W.	Grafton,	" 21,	Henry Chapin.
Estabrook, George W. (3)	Grafton,	" 22,	Henry Chapin.
Fernald, Hiram (3)	Grafton,	" 22,	Henry Chapin.
Field, M. Greenwood	Reading,	" 5,	William A. Richardson.
Flagg, Nahum H.	Worcester,	" 29,	Henry Chapin.
Fuller, Gardner A.	Boston,	" 20,	Isaac Ames.
Hale, Benjamin H.	Boston,	" 7,	Isaac Ames.
Hanson, George	Malden,	" 28,	William A. Richardson.
Hanson, John A.	W. Roxbury,	" 24,	George White.
Harris Charles H.	Millbury,	" 3,	Henry Chapin.
Harrington, Daniel	Roxbury,	" 19,	George White.
Howland, Freeman P., Jr.	Hanson,	" 16,	William H. Wood.
Jewett, Amory, Jr.	Boston,	" 12,	Isaac Ames.
Mauran, William A. (2)	Boston,	" 3,	Isaac Ames.
Moore, Samuel	Douglas,	" 20,	Henry Chapin.
Morse, Edwin	Boston,	" 22,	Isaac Ames.
Murray, Orrison B.	Lee,	June 12,	J. T. Robinson.
O'Sullivan, James D.	Boston,	May 5,	Isaac Ames.
Raddin, William H.	Saugus,	" 29,	George F. Choate.
Rathburn, Nathan H.	Lee,	June 3,	J. T. Robinson.
Rice, Oliver R.	Sudbury,	May 5,	William A. Richardson.
Richardson, Abijah	Cambridge,	" 22,	William A. Richardson.
Seaver, John	W. Roxbury,	" 21,	George White.
Shattuck, Charles P.	Newton,	" 13,	William A Richardson.
Smith, Asa P.	Grafton,	" 27,	Henry Chapin.
Sparhawk, David H.	Roxbury,	" 2,	George White.
Sweetser, Stephen	S. Reading,	" 3,	William A. Richardson.
Tilton, Daniel L. (1)	Chelsea,	" 12,	Isaac Ames.
Warner, Lewis	Williamsburg,	" 12,	Samuel F. Lyman.
Webb, Charles H. (4)	Boston,	" 10,	George White.
Webb, T. C. (4)	Quincy,	" 10,	George White.
Wright, Charles L.	Medford,	" 8,	William A. Richardson.
Wright, Samuel T. (5)	Somerville,	April 7,	William A. Richardson.

PARTNERSHIPS, &c.

(1) Tilton & Averill; (2) Chase, Brothers & Co.; (3) Estabrook & Fernald; (4) T. C. Webb & Co.; (5) Petition dismissed.